Supreme Court, U.S.
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No. 07-_____

IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as Superintendent of the Indiana State Prison,
Petitioner,

v.

CHRISTOPHER M. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

*Counsel of Record

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief and
Deputy Attorney General

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel does not require trial counsel to retain successive mental-health experts in search of one that will give counsel's desired favorable opinion?

II. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel permits attorneys in a death penalty case to exercise reasoned professional judgment to present expert testimony of a psychologist retained by the defense—the only one the state would pay for—that made both favorable and unfavorable findings in an attempt to make the best use of that expert that he can?

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PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through Superintendent of the Indiana State Prison Ed Buss, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit granting Christopher Stevens a writ of habeas corpus from his sentence of death.

OPINIONS BELOW

The opinion of the court of appeals (App. 3a) is reported at *Stevens v. McBride*, 489 F.3d 883 (CA7 2007), *reh'g and reh'g en banc denied*. The order of the district court (App. 50a) is reported at *Stevens v. McBride*, 492 F.Supp.2d 928 (N.D. Ind. 2005). The opinion of the Indiana Supreme Court on appeal from the denial of a petition for post-conviction relief (App. 136a) is reported at *Stevens v. State*, 770 N.E.2d 739 (Ind. 2002), *reh'g denied*, *cert. denied*, 540 U.S. 830 (2003). The opinion of the Indiana Supreme Court on direct appeal (App. 174a) is reported at *Stevens v. State*, 691 N.E.2d 412 (Ind. 1997), *reh'g denied*, *cert. denied*, 525 U.S. 1021 (1998).

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 2007. A petition for rehearing was denied on August 28, 2007. App 1a. The Court of Appeals amended its judgment on September 28, 2007. Justice Stevens extended the time for filing a petition for a writ of certiorari to January 25, 2008

(No. 07A438). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Christopher Stevens received the death penalty for intentionally murdering a ten-year-old boy during the course of molesting him and while on parole for a prior child molesting conviction. The facts supporting the convictions are supported by Stevens's two confessions—one to his brother and another to police—and overwhelming physical evidence; Stevens does not even dispute his guilt. Fourteen years after this crime, the Seventh Circuit, per a fractured decision authored by Judge Wood, reversed the sentence without any application of the standards governing habeas review found in 28 U.S.C. § 2254(d). As this Court has been willing to do in similar egregious cases that have flouted the limits on habeas review, it should grant this petition and reverse the judgment of the court of appeals that directed a retrial of the penalty-phase.

1. On the night before Respondent Christopher Stevens was released from prison for his first child molesting conviction, his cellmate, Tracy Eastin, predicted that Stevens would be back in prison within two months for another child molesting offense. Stevens replied, "No, I won't. Next time, I'll kill him." App. 227a.

Upon his release from prison in May 1993, Stevens went to live with his father in a subdivision in Cloverdale, Indiana. Ten year-old Zachary Snider lived in the same neighborhood about a quarter-mile away. During that summer, Stevens befriended, seduced, and repeatedly molested Zachary. On the morning of July 15, 1993, when Zachary threatened to tell his parents what had happened, Stevens murdered the boy and fulfilled his earlier promise to Eastin. In Stevens's words,

> [Zachary] said, he, he threatened to tell ... about me and him, and, ,uh, I'd just w< .t through a bunch of shit in Indy [the earlier conviction and imprisonment for child molesting], and that was just, just on my mind. I was like, I just didn't want to, thinking to myself, you know, I just can't go through all that shit again.

App. 232a. Stevens killed Zachary by first trying to suffocate him with a pillow, and when that didn't work, Stevens strangled Zachary with a cord from a video game controller. After a short time, Zachary started breathing again, so Stevens got a trash bag from the kitchen, wrapped it around Zachary's head, and suffocated him. App. 232a-233a.

Stevens then disposed of Zachary's body and bicycle by throwing them off of a bridge in a remote

location. Later that night, Stevens returned to the scene to retrieve the trash bag off of Zachary's head so that police could not trace the bag back to him. In the meantime, a massive manhunt was underway for the missing boy. App. 234a-235a.

On July 19, 1993, Stevens confessed to his brother Mark that he had murdered Zachary. Stevens told Mark that when Zachary threatened to tell his parents about his encounters with Stevens, he got scared and "clicked." Stevens gave his brother a detailed description of the events and of the location of the bridge where he left Zachary's body and bicycle. App. 230a.

Mark waited until July 21 to tell police about Stevens's admission. When police went to the bridge, they found the bicycle and a decomposing body of a boy. After his arrest, Stevens gave another detailed confession to police detailing his actions. He also wrote a letter to Eastin that read in part,

> You know your prediction was right. You said you thought that I'd be right back in jail two months after I got out. Well, I was back in four days short of two months. I think you might have cursed me. HA! HA! I don't really know what to say. Does it suprise [*sic*] you?

App. 236a.

2. The State of Indiana charged Stevens with murder and requested the death penalty. The trial court appointed two attorneys to represent Stevens that were duly qualified to handle capital cases pursuant to the heightened requirements of Indiana Criminal Procedure Rule 24. Jeffery Baldwin served

as lead counsel and, at the time of his appointment, had represented defendants in three other death penalty cases, none of which received a death sentence. Robert Clutter served as co-counsel to Baldwin. He had previously represented one capital defendant, also avoiding a death sentence. Both attorneys had substantial experience defending criminal felony cases. App. 181a-182a.

Baldwin and Clutter assembled a defense team that included investigator Larry Atwell, paralegal Heidi Marshall, and mitigation specialist Carol Knoy. Knoy was a former police officer with nine years of experience as a sentencing consultant and mitigation specialist, including work on two capital cases. On Knoy's suggestion, Baldwin and Clutter hired at public expense Dr. Lawrence Lennon, a psychiatrist with a background in child and adolescent psychology, and who, according to Knoy, had given impressive testimony in an earlier Indiana death penalty trial involving defendant Steven Holmes. App. 141a-142a, 182a.

Dr. Lennon was a former professor and chairman of the Psychology Department at St. Joseph's College and was the clinical director at the Humana Hospital—Indianapolis Child and Adolescent Psychiatric Center. Other capital defense attorneys also commended to Baldwin and Clutter Dr. Lennon's work in the Holmes case, one in which the defendant received a term of years instead of the death penalty. *See Holmes v. State*, 642 N.E.2d 970 (Ind. 1994). The similarities between Holmes's and Stevens's mitigating evidence relating to abusive childhoods and attendant psychological issues made Dr. Lennon's performance in the Holmes case

particularly important to Baldwin and Clutter. App. 142a, 182a-183a.

Dr. Lennon evaluated Stevens in person on six separate occasions, reviewed Stevens's confession, interviewed Stevens's family, and reviewed a "suitcase full of data" about Stevens that included school records, mental health records, and arrest records. App. 183a. Dr. Lennon conducted several psychological tests on Stevens. Trial R. at 5309-5311, 5358-61; PCR R. at 1880, 2034. Dr. Lennon was assisted in his assessment of Stevens by a social worker and a second psychologist. App. 183a. Although Baldwin and Clutter specifically instructed Dr. Lennon not to write a report detailing his findings until after he first discussed his opinions with them, Dr. Lennon ignored counsel's wishes and wrote a report anyway. He completed his report on July 18, 1994. App. 200a; Trial R. 5358-61.

Baldwin and Clutter were dissatisfied with Dr. Lennon as a potential witness because he had not diagnosed Stevens with mental illnesses that provided a defense or significant mitigating evidence. But the trial court had ordered that counsel complete the discovery of all expert reports by July 19, 1994, and submit their final witness lists by July 29, 1994, so that the State could adequately prepare for the trial scheduled for September 12, 1994. Trial R. 9, 11. Counsel accordingly disclosed Dr. Lennon's report on July 22, 1994, and listed for the first time Dr. Lennon as an actual witness on July 29, 1994. App. 144a n.4; Trial R. 508, 513.

Because Dr. Lennon's opinion did not support an insanity defense at the guilt-phase, counsel decided

to pursue a voluntary manslaughter defense under the theory that Stevens killed Zachary in "sudden heat." The jury nonetheless found Stevens guilty of murder.

At the penalty-phase, counsel presented evidence proving the following mitigating circumstances:

> One, Christopher Stevens was 20 years of age at the time of this offense; two, Christopher Stevens was raised in a poor, dysfunctional, nonnurturing environment; three, Christopher was physically, verbally, and emotionally abused and neglected as a child; four, Christopher Stevens was sexually abused as a child and was not believed or protected from such abuse; five, Christopher Stevens has performed poorly in school; six, Christopher Stevens was moved frequently and, therefore, was kept from establishing meaningful relationships with friends and family as a child; seven, Christopher Stevens has been diagnosed with severe depression and a passive dependent personality disorder; eight, Christopher Stevens as a child observed the sexual abuse of his step-sister; nine, Christopher Stevens was abandoned by his mother as a child; ten, Christopher Stevens has frequently considered and attempted suicide; eleven, Chris Stevens has abused alcohol and drugs as a child and as an adolescent; twelve, Christopher Stevens has confessed to the crime of murder of Zachary Snider; thirteen, Christopher Stevens has low average intelligence; fourteen, Christopher Stevens' mother was incarcerated for a period of his formative years; fifteen, Christopher Stevens' father was incarcerated for a period of his formative years; sixteen,

> Christopher Stevens was cooperative with and did not resist the arresting officers; seventeen, Christopher Stevens had inappropriate role models during his formative years; eighteen, Christopher Stevens suffers from low self-esteem, and this was created and reinforced by his family and peers.

App. 276a-277a n.28. This evidence included testimony from family, friends, a drug and alcohol counselor, child welfare officials, and documentation from schools, a mental health facility, and welfare agencies.

Additionally, Dr. Lennon testified at the penalty-phase. He explained that Stevens suffered characteristics of reactive attachment disorder (although Stevens did not satisfy all of the diagnostic criteria for a diagnosis), and demonstrated antisocial and sociopathic tendencies (although he could not make a diagnosis of antisocial personality disorder or sociopathic personality disorder). He also testified about Stevens's suffering sexual abuse as a child and prior alcohol and drug use, but acknowledged Stevens's statement to him that he stopped abusing substances when he was first arrested for the child molesting offense for which he was imprisoned before meeting Zachary. Dr. Lennon further explained that "so much of [his] behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and that ... his birth mother ... probably did do drugs or alcohol during pregnancy." App. 156a, 210a.

The jury recommended that the trial court impose the death penalty. The trial court later

independently sentenced Stevens to death.[1] App. 185a. On direct appeal, the Indiana Supreme Court affirmed both Stevens's conviction and death sentence. App. 226a. As to the sentence, the Indiana Supreme Court independently determined that Stevens should be sentenced to death, finding,

> The molestation and intentional murder of a ten-year-old child by one on probation, especially probation for a previous child molesting conviction, exemplifies a crime and criminal particularly worthy of the severest of penalties. While his confession and troubled childhood were mitigating circumstances properly found present, we agree with the trial court's determination that these weighed far less than the aggravating circumstances.

App. 279a. The Court denied certiorari. *Stevens v. Indiana*, 525 U.S. 1021 (1998).

3. Thereafter, Stevens filed a petition for post-conviction relief in the trial court. Among the various issues asserted, Stevens claimed that he received ineffective assistance of counsel at the guilt- and penalty-phases due to Baldwin and Clutter's handling of Dr. Lennon and mental health evidence.

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[1] Under Indiana law at the time of Stevens's trial, the trial judge had the sole responsibility for deciding whether a defendant should be sentenced to death, life without parole, or a specific term of years. The jury offered its advice through a recommendation to the trial judge as to its opinion about an appropriate sentence. Indiana Code §35-50-2-9(e) (1995). *See also Schiro v. Farley*, 510 U.S. 222, 226 (1994) (explaining how Indiana's capital advisory jury/judge sentencing scheme operates); *Judy v. State*, 275 Ind. 145, 166, 416 N.E.2d 95, 107 (1981) (same).

At an evidentiary hearing, Stevens presented testimony by psychiatrist Dr. Philip Coons and psychologist Dr. Robert Kaplan, frequent expert witnesses for defendants in Indiana criminal proceedings. Dr. Coons opined that Stevens may have suffered from a dissociative disorder—a condition formerly known as multiple personality disorder—where Stevens switched personalities with Zachary for a moment, leading Stevens to believe that Zachary wanted to be killed because of the molestation. App. 16a. Dr. Coons acknowledged, however, that diagnoses of dissociative disorders are controversial in the psychiatric field and that some prominent psychiatrists have written publications expressing skepticism as to their validity. PCR R. 1895-96. Dr. Coons also found, just as Dr. Lennon did, that Stevens showed characteristics of other personality disorders, such as antisocial personality disorder, although he did not meet the criteria for a diagnosis. He also observed Stevens's past substance abuse. PCR. R. 1884-86. Dr. Kaplan agreed with and largely reiterated Dr. Coons's opinion. App. 16a.

The post-conviction court entered detailed findings of fact and conclusions of law wherein it denied Stevens's petition. App. 174a. As it relates to the penalty-phase ineffectiveness claim, the post-conviction court found that trial counsel did not render deficient representation in retaining, investigating, and then ultimately using Dr. Lennon as a mental health expert witness because Dr. Lennon was a qualified psychologist that came highly recommended by counsel's own mitigation specialist and other members of the capital defense bar and because no other experts would have been

appointed just because counsel were unhappy with the results of Dr. Lennon's evaluation of Stevens. App. 189a-191a. The post-conviction court also found that Stevens was not prejudiced by the use of Dr. Lennon in large part because all of the other evidence of the crime and extensive cover-up refutes any theory that Stevens was mentally ill, let alone insane, at the time of the crime. Additionally, the state court noted that Drs. Coons and Kaplan testified about how Stevens forcibly raped and molested Zachary while all of the evidence presented at trial was that Zachary was a willing participant in the encounters. In the post-conviction court's view, this change in the nature of their relationship cast Stevens in a new, even more vicious character not otherwise portrayed to the jury or the trial court. "The jury would not consider such a violent, voracious predator as someone deserving a penalty less than death." App. 193a.

On appeal, the Indiana Supreme Court affirmed and, utilizing its standard of review for such cases, found in detail the post-conviction court's factual findings and legal conclusions to be supported by the record. App. 136a. The Court denied certiorari. *Stevens v. Indiana*, 540 U.S. 830 (2003).

4. Next, Stevens filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Stevens repeated his claim, among others not at issue here, that Baldwin and Clutter rendered ineffective assistance at the guilt- and penalty-phases of trial in the way they handled Dr. Lennon and mental heath evidence. The district court denied relief after determining that the state court adjudications were

not contrary to or an unreasonable application of federal law. App. 50a-135a.

The Seventh Circuit, per a fractured decision by Judge Wood, reversed in part and directed that a new penalty-phase trial be conducted due to ineffective assistance of counsel. First, Judge Wood, joined in result by Judge Manion, affirmed the denial of relief as to the guilt-phase. In so doing, the panel majority cited and applied the proper standard of 28 U.S.C. § 2254(d). App 17. Judge Ripple dissented from that portion of the opinion and expressed his view that counsel were ineffective at the guilt-phase because they should have found expert witnesses to support an insanity defense instead of a pursuing manslaughter defense. App. 29a-37a.

Second, Judge Wood, joined by Judge Ripple, found, independently and without analysis under section 2254(d), that trial counsel rendered ineffective assistance at the penalty-phase. This was for two reasons: 1) counsel did not investigate Dr. Lennon's professional opinion further even though they were dissatisfied with it and his services, and 2) counsel should not have denominated Lennon as their expert witness until after learning his opinions so that they would not have to disclose Dr. Lennon's damaging report in discovery. The panel majority found this performance to be prejudicial because the later-developed mental health opinions of Drs. Coons and Kaplan would have been relevant as mitigating evidence and Dr. Lennon gave damaging testimony on cross-examination by the prosecution, a fact that the court imputed to counsel. App. 19a-26a. The panel majority concluded its discussion of this claim

with only a conclusory reference to section 2254(d)'s "unreasonable application" requirement:

> We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens. The Indiana Supreme Court's ruling to the contrary amounted to an unreasonable application of *Strickland*.

App. 26a. Judge Manion dissented and explained his belief that the state courts' adjudications of the penalty-phase counsel claim cannot be considered objectively unreasonable in light of this Court's precedents. App. 37a-49a. The full panel agreed that Stevens's remaining arguments, none of which are relevant to this petition, lacked merit. App. 26a-29a.

The State, through its prison superintendent, sought rehearing and rehearing en banc. Rehearing was denied, although the panel amended its opinion to change the conditions under which the writ should issue per the State's request. App. 1a-2a.

5. This petition ensues. Stevens has also filed a certiorari petition seeking further review of his rejected claims. *Stevens v. Buss*, No. 07-7745.

REASONS FOR GRANTING THE PETITION

I. In this capital case, the Court of Appeals granted habeas relief for penalty-phase ineffective assistance of counsel without regard to 28 U.S.C. § 2254(d).

Since *Williams v. Taylor*, 529 U.S. 362 (2000), the Court has repeatedly admonished lower federal courts that, where state courts have adjudicated the claims at issue in a habeas corpus petition, relief cannot be granted unless those adjudications were *contrary to* or involved an *unreasonable application of* clearly established federal law.[2] This is one of an unfortunate and surprising number of cases, particularly capital cases, where the habeas court has neglected those instructions and has instead reviewed the merits of a penalty-phase ineffective assistance claim essentially *de novo*. The Court should grant this petition and reverse the court of appeals to make it clear that federal courts *must* give state court decisions the deference due to them under 28 U.S.C. § 2254(d), even when a sentence of death is at stake.

1. The decision below references section 2254(d)(1) or its operative "unreasonable application" standard only once when addressing Stevens's penalty-phase inadequate-assistance claim. Even then, it mentioned the proper standard only in its concluding sentence, when after independently finding error, it said that "The

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[2] The parties agreed below that this case involves only the "unreasonable application" clause of section 2254(d) and not the "contrary to" clause because the Indiana courts identified and applied the correct federal law.

Indiana Supreme Court's ruling to the contrary amounted to an unreasonable application of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." App. 26a. This is the only attempt at analysis under section 2254(d) in the panel majority's discussion of the penalty-phase claim. Such a summary statement amounts to nothing more than "lipservice to the *Williams* standard." *Rompilla v. Beard*, 545 U.S. 374, 404 (2005) (Kennedy, J., dissenting).

Instead of genuinely applying section 2254(d), the court of appeals reviewed Stevens's claim *independent* of the Indiana Supreme Court's contrary decision and concluded on its own that Stevens's attorneys rendered prejudicially deficient assistance at the penalty phase of trial. App. 24a ("We conclude, on this record, that the performance of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum."), 25a ("In this case, we find a reasonable probability—that is, one sufficient to undermine our confidence in the outcome of the sentencing phase—that the result would have been different if the jury had heard mainstream psychological testimony..."), and 26a ("We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens.").

That is precisely the analysis prohibited by section 2254(d)(1). *Yarborough v. Alvarado*, 541 U.S. 652, 665-66 (2004) ("We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a de novo matter."). It is well established that a state court decision that is "merely erroneous" cannot justify

habeas relief. *Early v. Packer*, 537 U.S. 3, 11 (2002) (per curiam).

The panel majority's *de novo* analysis of the penalty-phase counsel claim is in striking contrast to the *prior* section of its opinion discussing Stevens's guilt-phase counsel claim. There, the majority carefully explained why the Indiana Supreme Court's decision was *not* objectively unreasonable. App. 17a ("And, of course, we conduct this analysis through the lens of AEDPA's unreasonableness standard, a standard that 'allows the state court's conclusion to stand if it is one of severally equally plausible outcomes'," and "We therefore conclude that the Indiana Supreme Court did not unreasonably apply *Strickland* in determining that Stevens was not prejudiced..."). The court gave no such attention to the requirements of section 2254(d)(2) in its discussion of the penalty-phase claim.

At the very most, the court of appeals reviewed the state courts' decisions for "clear error" and not objective unreasonableness. Although he reached the correct result, even Judge Manion's dissent invoked long-standing Seventh Circuit precedent that "only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus," *citing United States ex rel. Bell v. Pierson*, 267 F.3d 544, 557 (CA7 2001), and, "[w]e therefore review for clear error in the Supreme Court of Indiana's decision." App. 43a-44a. As the Court has made clear, however, "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). The Seventh

Circuit has not yet recognized its own error in continuing to review state court decisions for clear error after *Andrade*.

2. The treatment afforded by the decision below is precisely the sort of analysis *prohibited* by section 2254(d), not to mention the Court's many precedents applying and explaining the statute. The court of appeals' insistence that disagreements with its conclusions are unreasonable "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (per curiam). It is also "inconsistent with the presumption that state courts know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam). Simply put, the court of appeals here "substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." *Id.* at 25. The Court should grant the petition and reverse the judgment of the court of appeals.

II. When section 2254(d) is properly applied to this case, there can be no question that the state courts' decisions hold up

Under the proper legal standard, there is no basis for issuing a writ of habeas corpus as to Stevens's sentence.

1. The main complaint of the decision below is that trial counsel failed to investigate adequately mental health evidence beyond utilizing Dr. Lennon's services. The court of appeals concluded, without reference to the prior state court decisions,

that trial counsel was obligated not just to investigate Stevens's mental health and history, but to go even further and deconstruct their own expert's evaluation, presumably with additional experts. Under this reasoning, counsel in capital cases are constitutionally obligated to investigate every expert's professional opinion until either they find a sufficiently helpful opinion or exhaust the font of potential expert witnesses. There is no authority, let alone clearly established authority of this Court, to support the novel assertion that counsel must not rely on the professional opinions of properly licensed and credentialed experts. Rather, the clearly established law is otherwise, that counsel may decide not to continue an investigation if it is reasonable under *all of the circumstances*, an inquiry that requires "a heavy measure of deference to counsel's judgment[ ]." *Strickland*, 466 U.S. at 690-91.

Moreover, as the state courts found, Stevens was not entitled to additional experts at public expense, so no funding for additional "exploratory" experts would have been granted by the trial court. App. 191a. The decision below does not even refute these state-court conclusions, so they can in no way be objectively unreasonable determinations of fact or applications of federal law. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985); *Granviel v. Lynaugh*, 881 F.2d 185, 192 (CA5 1989); *Harris v. Vasquez*, 949 F.2d 1497, 1516 (CA9 1991); *Pawlyk v. Wood*, 248 F.3d 815, 828 (CA9 2001).

To be sure, once counsel learned of Dr. Lennon's findings, they knew that Dr. Lennon's testimony would not be as helpful as they had initially hoped.

But the various circuits have long understood that such dissatisfaction does not entitle defendants to "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders." *Poyner v. Murray*, 964 F.2d 1404, 1419 (CA4), *cert. denied*, 506 U.S. 958 (1992). See also *Smith v. Cockrell*, 311 F.3d 661, 676 (CA5 2002) (same), *cert. dismissed by Smith v. Dretke*, 541 U.S. 913 (2004), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); *Williams v. Cain*, 125 F.3d 269, 278 (CA5 1997) (same), *cert. denied*, 525 U.S. 859 (1998); *Granviel*, 881 F.2d at 192. "Counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.'" *Walls v. Bowersox*, 151 F.3d 827, 835 (CA8 1998); *Granviel*, 881 F.2d at 192 (same).

Given the widespread agreement among the federal circuits as to the obligations of states and defense counsel when it comes to using expert witnesses in capital cases, Indiana courts did not erroneously, let alone unreasonably, apply federal law. It is the Seventh Circuit that has erred.

The remaining question in this regard is whether counsel were ineffective by choosing to present Dr. Lennon's testimony at all. "Neither option ... so clearly outweighs the other that it was objectively unreasonable for the [state courts] to deem counsel's choice ... a tactical decision about which competent lawyers might disagree." *Bell v.Cone*, 535 U.S. 685, 702 (2002). Although the court of appeals believed Dr. Lennon to be an incompetent witness, counsel and the Indiana courts disagreed in large part due to his credible background and experience. App. 141a-

142a, 189a-190a. Indeed, the state courts did give mitigating weight to many of Dr. Lennon's observations. App. 275a-276a & n.28.

There should be little doubt that Stevens's counsel would have been subject to an even stronger claim of ineffectiveness if, once having received Dr. Lennon's opinions and not having the time or resources to find an alternative, instead decided not to present *any* expert testimony about Stevens's background and mental health. Even if one concludes, as Judge Manion did, that Dr. Lennon was not very good witness on cross-examination (App. 48a), that is known only through the distorting lens of hindsight. *Strickland*, 466 U.S. at 689. Because it is counsel's performance—not Dr. Lennon's—that must be judged, the state courts properly recognized that Dr. Lennon was counsel's only acceptable option that counsel had available to them. The state courts, unlike the court of appeals, "indulge[d] a 'strong presumption' that counsel's conduct [fell] within the wide range of reasonable professional assistance," a necessary presumption "because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Id.* at 702.

2. The other theory on which the court of appeals found counsel deficient was in counsel's *identifying* Dr. Lennon as a testifying expert before they received his report. The record does not support either the factual or legal conclusions in this regard. The trial court ordered counsel to disclose any expert reports no later than July 19, 1994, and confirm the identity of all witnesses by July 29, 1994, or else be

barred from presenting such evidence at trial. Trial R. 9, 11. Dr. Lennon completed his evaluation on July 18, 1994. Trial R. 5358-63. Counsel thereafter disclosed the report to the State six days late[3], on July 25, 1994, Trial R. 508, and listed him as an expert witness on July 29, 1994, the final day counsel had to make that decision. Trial R. 513. Before that time, counsel had only referred to Dr. Lennon only as a *potential* expert witness just as the court of appeals thought they should have done. Trial R. 343. Had counsel not made the required disclosures when they did, then the defense would have had no expert available to call as a witness at trial. There certainly was no time left to launch a new investigation into the adequacy of Dr. Lennon's opinions. Counsel chose to use Dr. Lennon in spite of their reservations about him, and doing so was reasonable. That decision preserved Stevens's rights, not jeopardized them.

Not only was counsel's disclosure necessary to preserve Stevens's right to a full and fair sentencing proceeding, but counsel were also ethically and legally obligated to share Dr. Lennon's report with the prosecution prior to trial. The Indiana Supreme Court explicitly found that once Dr. Lennon prepared a written report and provided it to counsel, counsel's hands were tied by state law and disclosure was required. App. 144a. The decision below rejected this holding and ruled that Indiana state law did not compel disclosure of the report. The Indiana Supreme Court, not the Seventh Circuit, is the final arbiter of the Indiana rules of procedure

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[3] The record does not specifically disclose why counsel were so late in meeting this discovery deadline, but Petitioner assumes that it was because of delivery delays and not intentional delay.

and evidence, and the court of appeals was inexorably bound to honor its judgment. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

3. Finally, the decision below ignored the state courts' prejudice analysis and failed to accord it the appropriate deference. The state courts explained that Stevens suffered no prejudice from any of counsel's potential errors in developing and presenting mental health evidence because the objective facts of the crime and Stevens's own confession "strongly contradict[ ]" the notion that he was insane or impaired at the time of the crime. App. 154a-155a.

Stevens first tried to suffocate Zachary with a pillow. When that was unsuccessful, he strangled the boy with a cord from a video game controller. Then, once Zachary started breathing again after several minutes, Stevens retrieved a plastic garbage bag from his kitchen and suffocated Zachary by tying it around his head. Stevens then took the time to carefully dispose of Zachary's body and the boy's bicycle in a remote location. Thereafter, Stevens realized that he had left the bag tied around Zachary's head and that police could link it to the other bags in Stevens's home, so Stevens went back to the body, got the bag, and threw it away on a road where police later recovered it. All of this fulfilled Stevens's promise to his cellmate made nearly two months earlier that he would kill the next victim he molested to avoid getting caught. App. 227a-236a.

In light of Stevens's confessed actions before, during, and after the murder, it is difficult to see how a jury would view Stevens's current mental

health theories as anything other than a convenient excuse. More to the point, however, the state courts were not objectively unreasonable in believing so.

Additionally, Stevens's own post-conviction experts provided testimony that was far more damaging to Stevens's defense than anything Dr. Lennon said. Dr. Coons agreed that Stevens knew the wrongfulness of his conduct when he tried to cover up the murder. App. 155a, 193a. Both Dr. Coons and Dr. Kaplan, experts who are frequently employed by capital defendants in Indiana, revealed additional, highly prejudicial facts that would have completely undermined Stevens's penalty-phase argument that Zachary was a willing participant in the molestation. The doctors testified that Stevens forcibly molested Zachary against the boy's will, a fact that the jury was unaware of. To say the least, had the jury known the molestation was forcible, it is unlikely to have treated Stevens more leniently. Judge Manion appropriately pointed to this evidence as further support for the reasonableness of the state courts' findings of no prejudice in this case. App. 45a-46a.

To the court of appeals, however, it was beside the point that the mental health evidence Stevens proffered on collateral review was not persuasively mitigating in light of the objective facts because "[a]s a legal matter" the evidence was relevant. App. 24a-25a. But the *relevance* of Dr. Coons's and Dr. Kaplan's opinions is not at issue. The likely impact of their opinions on a jury is. *Strickland*, 466 U.S. at 694 ("[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In sum, the state courts were required under *Strickland* to assess the relative credibility of Stevens's new mental health evidence and its probable effect in light of the evidence as a whole. They did this, and did it reasonably, but the Seventh Circuit substituted its own view of the situation to justify vacating Stevens's death sentence.

Under no circumstances can a state court's straightforward and honest application of this Court's precedents form the basis for habeas relief under section 2254(d). The Court should grant the petition and reverse the judgment of the court of appeals to the contrary.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief and
Deputy Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*
Counsel for Petitioner

Dated: January 25, 2008

United States Court of Appeals

For the Seventh Circuit Chicago, Illinois 60604

August 28, 2007

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 05-1442

CHRISTOPHER M. STEVENS,

Appeal from the United States District Court for the Northern District of Indiana, Petitioner-Appellant, Hammond Division.

v.

No. 03 C 5

DANIEL R. MCBRIDE,

Superintendent, Allen Sharp, Judge.

Respondent-Appellee,

ORDER

Respondent-Appellee filed a petition for rehearing and rehearing en banc on July 2, 2007, and Petitioner-Appellant filed a petition for rehearing and rehearing en banc on July 27, 2007.

No judge in regular active service has requested a vote on the petitions for rehearing *en banc*, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petitions for rehearing and rehearing *en banc* are DENIED.

IT IS FURTHER ORDERED that the opinion released on June 18, 2007, is amended as follows:

Section III of the original opinion is withdrawn, and is replaced with the following new section:

Appeal no. 05-1442 Page 2

III

For the foregoing reasons, the judgment of the district court is AFFIRMED to the extent that it denies habeas corpus relief with respect to Stevens's conviction, and it is otherwise VACATED. The case is REMANDED with instructions to issue a writ of habeas corpus that vacates the current sentence of capital punishment. The State of Indiana is free to conduct a new death penalty hearing, providing that it files appropriate documents seeking such relief within 120 days of the mandate from this court.

United States Court of Appeals

For the Seventh Circuit

No. 05-1442

CHRISTOPHER M. STEVENS, Petitioner-Appellant,

v.

DANIEL MCBRIDE,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 03-CV-005—Allen Sharp, Judge.

ARGUED FEBRUARY 7, 2006—DECIDED JUNE 18, 2007

Before RIPPLE, MANION, and WOOD, Circuit Judges.

WOOD, Circuit Judge. Christopher Stevens, an emotionally disturbed young man who had been abused and raped as a child, was sentenced to death in Indiana state court for the molestation and brutal murder of 10-year-old Zachary Snider. At Stevens's trial, the only evidence presented by the defense concerning his mental state at the time of the killing was the testimony of a psychologist who believes that mental illness is a myth. After the Indiana courts rejected Stevens's direct appeal and post-conviction review petition, he brought this habeas corpus petition under 28 U.S.C. § 2254, claiming principally that his attorneys' investigation and presentation of expert psychological testimony at his trial amounted to ineffective assistance of counsel and deprived

him of his only opportunity to avoid conviction and a death sentence. We conclude that the defense attorneys provided in effective assistance at the penalty phase of the trial and grant Stevens's petition insofar as it relates to his sentence.

I

A

The underlying facts of this case are recounted in detail in the Indiana Supreme Court's decision affirming Stevens's conviction and sentence. *See Stevens v. Indiana*, 691 N.E.2d 412 (Ind. 1997). Those facts are entitled to a presumption of correctness, *see* 28 U.S.C. § 2254(e)(1), and they are in any event uncontested at this point. We repeat here only what is relevant to Stevens's current claims.

In February 1993, Stevens, who was 20 years old at the time, was convicted in Indiana state court of child molestation. After serving several months of his sentence, he was released on probation in May 1993. On the night before his release, Stevens had a conversation with a fellow inmate, Tracy Eastin, in which Eastin predicted that Stevens would be back in jail for the same crime again within two months. Stevens allegedly replied, "No, I won't. Next time I'll kill him."

Upon his release, Stevens went to live with his father in Cloverdale, Indiana. He soon befriended Snider, a 10-year-old who lived in the same subdivision as Stevens's father. On July 15, 1993, Snider went to Stevens's home in the late afternoon, where Stevens proceeded to molest him. Afterwards, Snider threatened to tell his parents about the assault; at this point, Stevens claims that he became scared and "clicked." He attempted to kill Snider

by smothering him with a pillow and then strangling him with a cord. After those methods proved unsuccessful, Stevens eventually managed to kill Snider by suffocating him with a plastic bag. Stevens then placed Snider's body and Snider's bicycle into the back of his car, drove out into the countryside, and threw the body and bike over a bridge. Later, he returned to the site to retrieve a plastic bag that he feared, if found, might assist the police in identifying him as Snider's killer.

When Snider did not return home during the evening of July 15, his parents began to search the neighborhood. They came across Stevens in front of his house. Lying to them, Stevens denied having seen Snider all day. On July 17, the police picked up Stevens for questioning, confronting him with the fact that a witness had seen Snider's bicycle parked in front of his home on the day of the murder. Stevens admitted to police that Snider had visited him briefly, but he denied having anything to do with his disappearance. Two days later, Stevens confessed to his brother Mark Stevens that he had killed Snider, explaining in detail what had occurred and directing his brother to the bridge where the body was hidden. Mark Stevens went to the police, who later arrested Christopher Stevens.

B

After Stevens was charged with Snider's murder the State announced its intention to seek the death penalty. The Putnam County Superior Court appointed two lawyers for Stevens: Jeffrey Baldwin as lead defense counsel and Robert Clutter as second counsel. Soon thereafter, the case was transferred to the Tippecanoe County Superior Court. Baldwin retained Carol Knoy as a defense mitigation specialist. From conversations with

Stevens, it quickly became apparent to the defense team that a mental health examination would be an important component of trial preparation. Stevens told his lawyers that he had been physically, mentally, and emotionally abused as a child, and had been raped by a stranger when he was 10 years old. Medical records from a psychiatric facility where Stevens was briefly a patient reported that he had attempted suicide. Doctors there had diagnosed him with major depression and possible schizophrenia. Stevens also wrote a letter to Knoy in which he stated that when he killed Snider he "put himself in Zachary's place, and he was doing to Zachary what he wished the man who had raped him would have done to him."

Upon Knoy's recommendation, defense counsel retained as a mental health consultant clinical psychologist Dr. Lawrence Lennon, who at the time was director of a child and adolescent psychiatric center at an Indianapolis hospital. Upon meeting with Dr. Lennon for the first time, defense counsel instructed him to evaluate Stevens but not to write a report on his findings. Despite this explicit direction, Dr. Lennon wrote a report and sent it to Stevens's attorneys. The report included numerous statements that were extremely detrimental to Stevens's case. Because this report is so central to Stevens's claims, we reproduce excerpts of it here:

> Mr. Stevens revealed no evidence of any hallucinations or delusions. . . . There is no reason to believe that he has ever been out of touch with reality except perhaps when he has been under the influence of drugs. . . .
>
> He said he has molested approximately 25-30 children (mostly boys) and has shot and killed one boy out west (later he recanted this story). . . .

> He rarely accepts responsibility for his actions and tries to blame others for all the problems he has encountered. . . .
>
> The murder of Zachary appears to be directly related to his fear of having to return to prison after Zachary revealed he would report Mr. Stevens' sexual assault. Mr. Stevens did not seem to reveal sincere sorrow for killing Zachary and is much more preoccupied with saving his own life.
>
> Sexually, Mr. Stevens seems well versed in pedophilia and readily accepts this diagnosis. . . .
>
> Mr. Stevens is in need of intensive counseling although due to his manipulative behavior he is not now a good candidate for psychotherapy. . . .
>
> Mr. Stevens is, at this time, a serious danger to society and there is every reason to believe he would continue to molest children, especially boys, if given another opportunity. Given his present mental state, one could not rule out another violent assault on a young victim if Mr. Stevens again felt it was necessary.

Upon receipt of the report, Stevens's lawyers immediately contacted Dr. Lennon to question why he had disobeyed their instructions. Stevens's attorney Robert Clutter testified that Dr. Lennon, echoing Marlene Dietrich's portrayal of the character Christine Helm Vole in the 1957 film version of Witness for the Prosecution, responded: "Don't worry about it. I'm sandbagging the State. . . . I'm trying to make them think that I'm going to be a good witness for them, but I'm going to take—when I take the stand, I'm going to be able to turn this all around on them."

Around the same time, Stevens's lawyers also learned that Dr. Lennon subscribed to an unusual psychological theory known as the "myth of mental illness." Stevens's lawyers believed that Dr. Lennon's belief in this theory placed him in the one percent minority of psychologists who believe that mental diseases do not exist. They concluded that he was a "quack." Stevens's lawyers also learned about Dr. Lennon's favored therapeutic technique, "trust and bonding therapy," which the lawyers (and later Dr. Lennon himself) described as "putting 18-year-olds on his lap and sticking a bottle in their mouth." Despite their serious and well-founded doubts about Dr. Lennon's fitness as a defense expert, Stevens's counsel did not seek an alternative. In addition, prior to trial the lawyers sent a copy of Dr. Lennon's report to the prosecution.

Neither Dr. Lennon nor any other mental health professional testified during the guilt phase at the trial. Instead, Stevens's counsel tried to convince the jury that Stevens was guilty of voluntary manslaughter rather than intentional homicide because he acted in a state of sudden heat provoked by Snider's threat to disclose Stevens's molestation of him. This strategy was unsuccessful, as the trial court refused to give a proposed jury instruction on voluntary manslaughter. The jury returned a guilty verdict.

At the penalty phase of the trial, defense counsel presented testimony from Stevens himself, as well as from numerous members of Stevens's family. As their final witness, Stevens's lawyers called Dr. Lennon. Dr. Lennon began his testimony by describing at length his preferred form of therapy for troubled children, stating that he typically would forcibly hold a young person down in his lap for "a fun time where the child tries to get away" until the child is exhausted and then, "we'll talk about the child, the little baby inside this boy that was never nourished, never loved . . . and in some cases we'll actually give a

bottle. The mother will give a bottle to the 17-year-old and 16-year-old . . . ." Dr. Lennon also described his diagnostic technique of looking at photographs of troubled children at younger ages where "[w]e see . . . a beautiful child that it makes you wonder why, what happened . . .and then we look at where the person is today, and we try to figure out what's going on."

Eventually turning to the subject of Stevens, after more than twenty pages of testimony on his theories of child development and his "trust and bonding" therapy, Dr. Lennon testified about the "terrible childhood" and some of the abuse Stevens had experienced. Notably, Dr. Lennon did not provide any evaluation of Stevens's current mental health, except to say that Stevens "shows traits of . . . [are active] attachment disorder," which, according to Dr. Lennon, means that Stevens is "going to live . . . by using people." Dr. Lennon also stated that Stevens is "emotionally like a twelve-year-old" just after describing him as "a very pathetic kid." Dr. Lennon said nothing to connect Stevens's difficult childhood to his mental state at the time of the murder.

The prosecution's cross-examination of Dr. Lennon closely tracked Dr. Lennon's written evaluation of Stevens. Prosecutors asked Dr. Lennon to confirm his statement that the murder of Snider was directly related to Stevens's fear of having to return to prison. Dr. Lennon volunteered that Stevens had antisocial qualities and sociopathic traits. After walking Dr. Lennon through the report, the prosecutor asked Dr. Lennon whether Stevens had been sexually aroused by killing Snider and whether he had masturbated on Snider's body. Dr. Lennon responded that Stevens had admitted that he had done so. Dr. Lennon had never disclosed this devastating fact to defense counsel.

The jury unanimously recommended a death sentence. After Stevens's attorneys called Dr. Lennon to testify a second time at the sentencing hearing, during which Dr. Lennon described Stevens as presenting "a great risk to society," the trial court accepted the jury's recommendation of death. In so doing, the court stated for the record that it found that the mitigation evidence presented by Stevens was "far outweighed" by the aggravation factors provided by the State. In summary the court stated:

> [T]he Court finds this murder was calculated. It was motivated by self-preservation, coolly performed with deliberation, and coupled with the defendant's sexual gratification. The defendant placed the possibility of his arrest for child molesting above the life of a ten year old boy. He stated that if placed in this position he would kill in order to avoid returning to jail. That is exactly what he did. He clearly acted in a cold-blooded manner.

The Indiana Supreme Court affirmed Stevens's conviction and sentence on direct appeal. After obtaining new counsel, Stevens filed a state petition for post-conviction relief. After holding an evidentiary hearing, the trial court denied this petition; the Indiana Supreme Court later affirmed this denial. Finally, Stevens filed this petition for habeas corpus in district court. The district court denied Stevens's claims, leading to this appeal.

II

Our review of Stevens's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, which permits a federal court

to issue a writ of habeas corpus only if the state court reached a decision on the merits of a claim, and that decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). Since Stevens's principal argument involves a claim of ineffective assistance of counsel, it is governed by the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984), under which a defendant must show both that his lawyers' performance was deficient and that this deficient performance prejudiced his defense.

Although there is significant overlap between Stevens's claims that he received ineffective assistance of counsel relating to the investigation and presentation of expert psychological evidence at the guilt phase of the trial and at the penalty phase, for clarity we consider each argument in turn. We then briefly address two additional arguments that Stevens raises in his petition.

A. Guilt Phase

Throughout his state and federal post-conviction proceedings, Stevens has claimed that his lawyers were ineffective for not adequately investigating his mental state and, as a result, failing to pursue an insanity defense during the guilt phase of the trial and instead relying on a doomed voluntary manslaughter theory. In its decision denying post-conviction relief, the Indiana Supreme Court rejected this argument, concluding that defense counsels' decision not to pursue such a defense was a strategic one based on adequate investigation. In any case, the court held, Stevens was not prejudiced by his lawyers'

performance because Stevens's actions during and after the killing constituted such strong evidence that Stevens was aware of the wrongfulness of his conduct that no reasonable jury could conclude otherwise.

Our review of Stevens's counsels' performance is "highly deferential"; Stevens is required to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotation marks omitted). The choice not to investigate a particular defense does not constitute deficient performance "if a lawyer has made a reasonable decision that makes particular investigations unnecessary." *Adams v. Bertrand*, 453 F.3d 428, 436 (7th Cir. 2006) (quotation marks omitted).

In an attempt to overcome the presumption of sound trial strategy, Stevens relies on his lawyers' frank admissions at the state post-conviction hearing that they were aware from the beginning of their representation of Stevens that a comprehensive mental health evaluation would be a crucial prerequisite for determining trial strategy, yet after Dr. Lennon failed to provide them with such an evaluation they neglected to consult an alternative mental health expert. Stevens also emphasizes that his lawyers did not offer any rationale for their decision not to seek an additional expert. To the contrary, they explicitly disclaimed any strategic basis for their actions.

In contrast, the State, echoing the Indiana Supreme Court, contends that defense counsels' investigation of Stevens's mental state was adequate because it was reasonable for them to rely on Dr. Lennon, whom the State describes as a well-qualified and experienced mental health professional. The State further argues that it was a reasonable strategic choice for counsel to choose a voluntary manslaughter defense over a mental illness

defense, since, it claims, choosing the latter path "would have opened the door to the admission of incriminating evidence not otherwise presented at the guilt phase," namely, Eastin's testimony regarding Stevens's jailhouse statement.

The general qualifications of an expert witness do not guarantee that the witness will provide proficient assistance in any given instance. For example, even the most brilliant of witnesses might fail to address the important question at issue or might simply reiterate propositions so well-known that they are proper subjects for judicial notice. Experience in the federal courts illustrates this point. In an antitrust case, for example, this court upheld a district court's exclusion of the expert testimony of a Nobel Prize-winning economist on the ground that, despite his impeccable qualifications, his testimony "mainly concerned a matter not in issue" (probably be-cause counsel never asked him the right questions). In re *Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 786 (7th Cir. 1999). There, the relevant rule was Federal Rule of Evidence 702, which requires not only that an expert witness be "qualified as an expert by knowledge, skill, experience, training, or education," but also that the expert's testimony be "the product of reliable principles and methods."

Indiana, naturally, is under no obligation to follow federal procedural rules, including the rules of evidence. At the time of Stevens's trial, however, Indiana had a rule very much like the present FED. R. EVID. 702, or like IND. R. EVID. 702 (effective Jan. 1, 1994): "[G]iven a subject matter appropriate for expert testimony, the opinion must be preceded by a foundation of evidence establishing the witness's credentials as an expert and the reliability of any scientific methods utilized by the witness to reach the opinion." *See Noblesville Casting Div. of TRW, Inc. v. Prince*,

438 N.E.2d 722, 727 (Ind. 1982); *see also Martin v. Roberts*, 464 N.E.2d 896, 899 (Ind. 1984) (holding that a potential expert witness "had to show to the trial judge his knowledge and experience in the field to qualify as an expert"). The problem here related first to the methods that Dr. Lennon used and his idiosyncratic view of mental disorders, and even more importantly, to the fact that Dr. Lennon's views favored the prosecution. Stevens's lawyers were aware that Dr. Lennon was part of a tiny minority of mental health professionals. (It is odd, given his views, that Dr. Lennon had worked at a psychiatric hospital. As the website of the American Psychiatry Association illustrates, psychiatrists devote their lives to the study and treatment of mental disorders. *See http://www.psych.org/about_apa/*. They, and the psychologists who frequently work with them, would undoubtedly take issue with the idea that they are tackling a "myth.")

In light of the stakes in the case and the evidence the defense had to confront, it would not have been reasonable for defense counsel to rely on Dr. Lennon's evaluation of Stevens based only on his credentials.

Putting that question to one side for now, we are also troubled by the State's effort to characterize the defense lawyers' reliance on a voluntary manslaughter defense as a reasonable strategic choice. As the Indiana Supreme Court recognized in roundly rejecting Stevens's argument on direct appeal that the trial court should have given the voluntary manslaughter instruction, "[n]othing in these facts" indicates that Stevens acted in "sudden heat" as defined by Indiana law, since "words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat warranting an instruction on voluntary manslaughter." *Stevens*, 691 N.E.2d at 426-27 (quoting *Matheny v. Indiana*, 583 N.E.2d 1202, 1205 (Ind. 1992)).

Nor is the State's assertion that a mental illness defense would have opened the door to Eastin's testimony particularly telling. As Stevens correctly points out, the same door would have been opened if counsel had managed to obtain a voluntary manslaughter instruction, since both defenses involve the element of intent.

In light of Stevens's lawyers' admissions and the overall weakness of the defense they presented at trial, we are inclined to believe that their performance was ineffective. Before attempting to resolve that issue definitively, however, we look at the prejudice branch of the *Strickland* test. We do so because the Supreme Court has explicitly noted that both deficient performance and prejudice must be shown in order to prove constitutionally ineffective assistance of counsel. If either element is missing, the petitioner cannot prevail. *See Strickland*, 466 U.S. at 697. We therefore turn to the question whether Stevens was prejudiced by his counsels' performance at the guilt phase of his trial.

In Indiana,"[a] person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35-41-3-6. This is a difficult standard to meet; the defendant carries the burden of proof and the Indiana Supreme Court has made clear that it will reverse a trial court's denial of an insanity claim "only when the evidence is without conflict and leads only to the conclusion that the defendant was insane when the crime was committed." *Thompson v. Indiana*, 804 N.E.2d 1146, 1149 (Ind. 2004).

To show that an insanity defense was possible, Stevens relies heavily on several mental health experts who testified at the post-conviction hearing that Stevens was

severely mentally ill and that his mental illness played a determining role in the murder. After conducting a comprehensive psychological evaluation of Stevens, Dr. Philip Coons, Professor of Psychology at the Indiana School of Medicine, diagnosed him as having a "very severe dissociative disorder," opining that "at the time of the murder, he was not only dissociating, but the identity between he and [Snider] got mixed up. . . . [H]e's basically killing Zach because it's what he would have wanted in that molestation at age 10, to have been killed by his abuser." While Dr. Coons acknowledged that Stevens "obviously knew right from wrong" after the killing, "because he engaged in all kinds of behaviors to cover up what he had done," Coons emphasized that Stevens's ability to appreciate the wrongfulness of his conduct at the time of the murder was "impaired." Dr. Robert Kaplan, a clinical psychologist, agreed that it was "very clear" that Stevens suffers from "a dissociative disorder," explaining that a family history of physical and sexual abuse corroborated such a diagnosis, as did a review of Stevens's behavior during his videotaped confession. Dr. Kaplan described Stevens's childhood as "a recipe for developing someone with a dissociative disorder." Dr. Kaplan, like Dr. Coons, testified that it was his opinion that "[t]he part of [Stevens] that's able to appreciate the wrongfulness of his conduct was disengaged when he was dissociating," adding that it was clear that Stevens was under extreme emotional distress and "was actively dissociating at the time that the murder was occurring."

To prove prejudice it is not enough for Stevens simply to show that a mental illness line of defense was available. Strickland requires him to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Id.* And, of course, we conduct this analysis through the lens of AEDPA's unreasonableness standard, a standard that "allows the state court's conclusion to stand if it is one of several equally plausible outcomes." *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997).

Considering the evidence in the record of Stevens's extended efforts to kill Snider and later to cover up the murder, the Indiana Supreme Court's conclusion that no jury could conclude that Stevens did not appreciate the wrongfulness of his conduct at the time of the murder was not implausible. Although we think that there is a possibility that a jury presented with the expert testimony of Dr. Coons and Dr. Kaplan might have concluded that Stevens was legally insane at the time of the killing based on a dissociation theory, this possibility does not render the Indiana Supreme Court's contrary conclusion unreasonable. *See Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (AEDPA's unreasonableness standard "means something like lying well outside the boundaries of permissible differences of opinion"). We therefore conclude that the Indiana Supreme Court did not unreasonably apply *Strickland* in determining that Stevens was not prejudiced by his counsels' failure adequately to investigate and pursue an insanity defense during the guilt phase of his trial.

One final comment on Stevens's guilt phase claim: in his reply brief, Stevens argues that, in addition to an insanity plea, his trial lawyers should have pursued a defense of guilty but mentally ill (GBMI). *See* Ind. Code § 35-36-2-5. Such a defense is available in cases in which a defendant "was mentally ill but able to distinguish right from wrong at the time of the offense." *Weeks v. Indiana*, 697 N.E.2d 28, 29 (Ind. 1998). Although a jury finding of GBMI "does not guarantee a defendant that the death

penalty will not be imposed . . . as a practical matter, defendants found to be guilty but mentally ill of death-penalty-eligible murders normally receive a term of years or life imprisonment." *Prowell v. Indiana*, 741 N.E.2d 704, 717 (Ind. 2001) (internal citation omitted). For this reason, the Indiana Supreme Court has held that a defendant claiming ineffective assistance of counsel may prove prejudice by showing that but for his counsel's deficient performance "a trial would have produced a result of . . . guilty but mentally ill." *Id.* at 717.

Merits aside, we find it inappropriate to consider this argument because Stevens never argued to the Indiana courts that this was one way in which he intended to prove his ineffective assistance of counsel claim. Section 2254(b)(1)(A)'s exhaustion provision "requires the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings." *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir. 2004). Adequate presentation of a claim requires a petitioner to "present both the operative facts and the legal principles that control each claim to the state judiciary." *Rittenhouse v. Battles*, 263 F.3d 689, 695 (7th Cir. 2001). Here, although Stevens presented his ineffectiveness claim to the state courts, he never presented as a supporting argument the lawyers' failure to raise the GBMI defense at trial. (It may be worth noting here that although we assess counsel's performance as a whole for purposes of granting certificates of appeal ability under 28 U.S.C. § 2253(c)(2), and thus a certificate identifying ineffective assistance of counsel brings up all of counsel's actions, *see Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005) ("[I]t is the overall deficient performance [by a defendant's attorney], rather than a specific failing, that constitutes the ground of relief."), the purposes behind the rules of procedural

default requires a party to present to the state court both the facts and the law on which he relies. Thus, the failure to alert the state court to a complaint about one aspect of counsel's assistance will lead to a procedural default.) Instead, throughout the post-conviction proceedings, Stevens couched his mental illness defense theory either in general terms (contending in his petition for post-conviction relief that his counsels' "unreasonabl[e] fail[ure] to investigate, develop, prepare, and present available evidence, including but not limited to evidence of diagnosable mental and emotional disabilities, [ ] would have given rise to a defense to the charge") or in terms specific to an insanity defense (arguing in his proposed conclusions of law that Dr. Coons's testimony, for example, supported a finding that Stevens was unable to "appreciate the wrongfulness of his conduct at the time of the killing"). Neither argument sufficiently alerted the state court to the fact that Stevens intended to prove ineffectiveness through counsel's failure to present the GBMI claim, and therefore Stevens may not do so here.

B. Sentencing Phase

In seeking relief from his capital sentence, Stevens repeats many of the same arguments regarding the inadequacy of defense counsels' handling of expert psychological testimony that he made for the guilt phase. For sentencing purposes, he stresses counsels' failure to develop mitigation evidence related to his mental state and their ill-fated decision to call Dr. Lennon not once, but twice, as a defense witness. The Indiana Supreme Court rejected the first aspect of this claim for the same reason it rejected Stevens's guilt phase ineffectiveness claim: it concluded that defense counsel had adequately investigated Stevens's mental health through Dr. Lennon

and then made a strategic decision not to present mitigation evidence related to Stevens's mental state. The court did not, however, have anything to say about Stevens's lawyers' decision to call Dr. Lennon as a defense witness for sentencing purposes, other than to acknowledge Stevens's argument that Dr. Lennon "was a fatal [sic] witness for the defense."

The Indiana death penalty statute requires the State to prove beyond a reasonable doubt the existence of at least one enumerated aggravating circumstance. Ind. Code § 35-50-2-9(b)(1). In Stevens's case, the State focused on three aggravating circumstances: that Stevens committed the murder while committing the crime of child molestation, that Stevens was on probation at the time of the murder, and that the victim was under the age of 12. The statute allows a defendant to provide evidence about both the aggravating circumstances alleged by the prosecution and enumerated mitigating circumstances. Here, at least two such mitigating circumstances were implicated: first, that "[t]he defendant was under the influence of extreme mental or emotional disturbance when the murder was committed," and second, that "[t]he defendant's capacity to appreciate the criminality of the defendant's conductor to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect." Ind. Code § 35-50-2-9(c)(2) & (6). The only other mitigating circumstance that could have applied to Stevens under Indiana law was the catch-all "[a]ny other circumstances appropriate for consideration." Ind. Code § 35-50-2-9(c)(8).

The Supreme Court has made clear that in evaluating claims of ineffective counsel, "we must take [the] purpose [of assistance of counsel]—to ensure a fair trial—as the guide." *Strickland*, 466 U.S. at 686. *Strickland* held that counsel's performance during the capital sentencing phase of a criminal case is subject to the same standards as

counsel's performance during the trial itself. *Id.* at 686-87. In other words, the petitioner must demonstrate that counsel was ineffective and that the petitioner was prejudiced by counsel's performance. *Id.* at 687. Counsel's most "basic duties" include the "duty to advocate the defendant's cause," the "duty to bring to bear such skill and knowledge as will render the trial [or capital sentencing phase] are liable adversarial testing process," and the "duty to investigate," which was at issue in *Strickland*. *Id.* at 688, 691.

In assessing whether counsel was ineffective, the *Strickland* Court requires the "defendant making a claim of ineffective assistance [to] identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Following such a showing, "[t]he court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* Although counsel's strategic choices are given considerable deference, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

Strickland particularly referred to "[p]revailing norms of practice as reflected in American Bar Association standards" as "guides to determining what is reasonable," but it emphasized that a court's ultimate determination of counsel's effectiveness must be grounded in the specific circumstances of the case. *Id.* at 688. The ABA Guidelines state that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989).[1]

Although Stevens's trial counsel presented testimony from a number of witnesses, principally family members, during the penalty phase of the trial, very little of this testimony addressed any statutory mitigating factor other than perhaps the catch-all "other circumstances" factor. None of it addressed whether Stevens was suffering from an extreme emotional disturbance or was unable to appreciate the wrongfulness of his conduct at the time of the murder, both theories that Dr. Coons's and Dr. Kaplan's later diagnoses of Stevens suggest would have been supported, had counsel only pursued them. *See* Ind. Code § 35-50-2-9(c)(2) & (6). Stevens contends that this failure to investigate and present mitigation evidence on his mental state constituted deficient performance. The State responds that defense counsels' choice not to look for other mental health professionals and instead to rely on Dr. Lennon's testimony was a reasonable strategic decision on the part of counsel and "a straightforward approach to mitigation, as it explained reasons for Stevens's conduct that portrayed Stevens himself as a victim."

The strategic reasons that might, at a stretch, have justified this decision at the guilt phase, fall apart when we

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[1] Later, the Supreme Court cited this standard specifically and approvingly in its decision in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The *Wiggins* case, however, was decided six years after the Indiana Supreme Court considered Stevens's ineffective assistance of counsel claims, and therefore for purposes of this case cannot serve as a source of "clearly established Federal law, as determined by the Supreme Court." *Eckstein v. Kingston*, 460 F.3d 844, 848 (7th Cir. 2006). Nevertheless, *Wiggins* sheds some light on what the Court itself understood as the scope of its *Strickland* holding.

consider that at the sentencing phase Stevens had nothing left to lose. The lawyers' decision to forego presenting this kind of mitigation evidence was made without the kind of investigation into Stevens's mental health that Strickland calls for, after Stevens's lawyers had concluded that Dr. Lennon was a "quack." Indeed, it is uncontested that Stevens's lawyers knew nothing about the content of Dr. Lennon's planned testimony. The lawyers confessed at the post-conviction hearing that they were utterly in the dark about what Dr. Lennon would say when he took the stand. They frankly admitted that during trial preparations, Dr. Lennon would only repeat, "I can handle it. Don't worry about it." This is a complete failure of the duty to investigate with no professional justification. Where an expert witness's opinion is "crucial to the defense theory[,] defense counsel's failure to have questioned [the expert] . . . prior to trial is inexcusable." *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000).

Furthermore, given the fact that defense counsel did know what Dr. Lennon had written in his report, we cannot imagine what they hoped to gain by calling Dr. Lennon to the stand at sentencing. This decision was the catalyst for their action in turning over Dr. Lennon's extremely detrimental written report to prosecutors prior to trial. The Indiana Supreme Court indicated that this fact did not constitute an indication of deficient performance since the trial court had required "any reports from experts" to be turned over to the State prior to trial. *Stevens v. Indiana*, 770 N.E.2d 739, 748 n.4 (Ind. 2002). Our review of the record reveals, however, that the trial court's order pertained only to reports from expert trial witnesses retained by the defense. Stevens's lawyers could have designated Dr. Lennon as a trial consultant rather than an expert witness, thereby shielding his written report from the prosecution. *See* Indiana Trial Rule 26(B)(4)(b) ("A

party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only . . . upon a showing of exceptional circumstances. . . ."); cf. *Beauchamp v. Indiana*, 788 N.E.2d 881, 892 (Ind. Ct. App. 2003) (applying Rule26(B)(4)(b) and stating that "a party should certainly be protected when obtaining expert advice he requires in order to properly evaluate and present his case without fear that every consultation will be discoverable").

A straightforward application of the first *Strickland* requirement compels a conclusion that these "acts and omissions" of Stevens's counsel during the capital sentencing phase constitute errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 690. We conclude, on this record, that the performance of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum.

We thus turn to the prejudice inquiry. The *Strickland* Court held that in order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

As it did for the guilt phase of the trial, the Indiana Supreme Court reasoned that Stevens was not disadvantaged by his counsels' failure to develop mitigation evidence regarding his psychological state because such evidence "would have been strongly contradicted by the extensive evidence of the defendant's multiple attempts to kill Zachary and then carefully to take

steps to cover-up the crime." *Stevens*, 770 N.E.2d at 754. But there is an important difference between the statutory mitigating factors of § 35-50-2-9(c)(2) & (6) for capital sentencing purposes and the requirements for proving an insanity defense at the guilt phase. Furthermore, the burden on the defendant is not as heavy at sentencing as during the guilt phase. *See Baird v. Davis*, 388 F.3d 1110, 1122 (7th Cir. 2004) ("Substantial impairment of one's capacity to conform conduct to the requirements of law as a result of mental disease or defect is qualitatively different from the mere status of being 'under the influence' of extreme mental or emotional disturbance."); *St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002) ("While a defendant's mental state at the time of the crime might not rise to the level of a defense to the crime, it can be relevant in a mitigation hearing."). As a legal matter, a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not.

In this case, we find a reasonable probability—that is, one sufficient to undermine our confidence in the outcome of the sentencing phase—that the result would have been different if the jury had heard mainstream expert psychological testimony of the sort presented by Dr. Coons and Dr. Kaplan at the post-conviction hearing. *See Strickland*, 466 U.S. at 694. Competent evidence of Stevens's mental illness would have strengthened the general mitigation evidence presented by defense counsel concerning Stevens's difficult background by focusing the jury on the concrete results of years of abuse on Stevens's psyche. There was, in addition, little downside risk of presenting such evidence to the jury; evidence of the most damning sort was already before the jury. Cumulative evidence of his predatory pedophilia and his specific actions on the fateful day was not likely to make any

difference. And unlike general mitigation evidence concerning Stevens's background, evidence about Stevens's severely dissociated condition and impaired ability to appreciate the wrongfulness of his conduct at the time of the killing would have provided his lawyers a basis for rebutting the aggravating factors highlighted by the State.

On this record, defense counsels' decision to call Dr. Lennon to testify before the jury at the penalty phase—not to mention their decision to call him a second time to testify before the trial judge at sentencing—can only be viewed as prejudicial to the outcome of the sentencing proceeding. Not only did Dr. Lennon stun defense counsel by revealing to the jury that Stevens had engaged in necrophilia after the murder, he also gave the prosecution a gift by expressing his belief in Stevens's future dangerousness—a subject that the prosecution itself is not permitted to argue as an aggravating circumstance under Indiana law. *See Wisehart v. Indiana*, 693 N.E.2d 23, 60 (Ind. 1998). Not only did Dr. Lennon's testimony almost certainly influence the jury against Stevens, it also evidently had a strong impact on the trial judge. One cannot read the court's sentencing order, with its references to "cool deliberation," "self-preservation," and "sexual gratification," without seeing a close reflection of Dr. Lennon's written report and testimony.

We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens. The Indiana Supreme Court's ruling to the contrary amounted to an unreasonable application of *Strickland*.

C. Other Claims

In addition to his arguments about his counsels' handling of the expert psychological evidence, Stevens

raises two other complaints about his lawyers' assistance on which we comment briefly: that they were ineffective for failing to object to the requirement that he wear a stun belt throughout the trial and that the district court improperly denied him discovery to pursue an argument that prosecutors presented perjured testimony to the jury.

With regard to the stun belt, Stevens claims that a criminal defendant has a clearly established constitutional right to be free of restraints at trial and that he was prejudiced because his fear of being electrocuted made him appear withdrawn and unremorseful to the jury. The Indiana Supreme Court found no merit in this claim. While acknowledging that since the time of Stevens's trial it had decided that criminal defendants may not be required to wear stun belts in Indiana courtrooms, *see Wrinkles v. Indiana*, 749 N.E.2d 1179 (Ind. 2001), the court concluded that Stevens was not prejudiced by being forced to wear the device because the jurors were not aware that he had it on and because juror testimony at the post-conviction hearing did not indicate that the device had a significant effect on Stevens's demeanor.

The Indiana Supreme Court's analysis of this claim is not unreasonable. Although the six jurors who testified at the post-conviction hearing stated that Stevens appeared emotionally withdrawn at trial, Stevens also appeared withdrawn in the videotaped confession in which he was not wearing any restraint. It is thus impossible to know whether Stevens's demeanor at trial was a result of being forced to wear the stun belt or just reflective of his more general state of mind and the emotions he was experiencing in the courtroom.

In an attempt to salvage this claim, Stevens contends that the use of a stun belt during a criminal trial is inherently prejudicial. The cases cited by Stevens do not,

however, go so far. They hold instead that a defendant's general right to be free of restraints in the courtroom is not absolute, but rather it is based on a balancing of the defendant's right not to be viewed in a prejudicial light by the jury against the court's need for security. *See Deck v. Missouri*, 544 U.S. 622, 633 (2005) (noting that although "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," this constitutional requirement "is not absolute" and so a judge may take account of "special circumstances . . . that may call for shackling"); *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986) ("holding that the conspicuous . . . deployment of security personnel in a courtroom during trial" must be evaluated on a "case-by-case" basis); *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (declining to hold that the binding and gagging of a criminal defendant is unconstitutional "under any possible circumstances"). In keeping with this line of cases, we have described the use of a stun belt as a "method[ ] of restraint that minimize[s] the risk of prejudice" because it is hidden beneath a defendant's clothing. *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997).

Stevens's final argument is that the district court erred by refusing to permit him to conduct discovery into an alleged pre-trial deal between prosecutors and state witness Tracy Eastin, in which prosecutors were going to give Eastin a letter requesting leniency in exchange for his testimony against Stevens. Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts states that "[a] party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." The district court concluded that discovery was not war-ranted in this case

because the letters Stevens presented as evidence of the alleged deal showed only that prosecutors had attempted to assist Eastin "to obtain a safe housing assignment within the prison system so that he could be free from a possible assault from fellow inmates who were upset with his having testified against the petitioner."

Stevens argues only that the district court read the correspondence between prosecutors and Eastin too narrowly, and it should have inferred that a broader pre-existing deal had been reached. Suffice it to say that we are not persuaded. The district court's interpretation of the letters, while perhaps not the only possible way to look at them, was reasonable, and its denial of discovery on this basis was well within its discretion.

III

For the foregoing reasons, the judgment of the district court is AFFIRMED to the extent that it denies habeas corpus relief with respect to Stevens's conviction, and it is otherwise VACATED. The case is REMANDED with instructions to issue a conditional writ of habeas corpus that sets aside the sentence of capital punishment unless, within 120 days, the State affords Stevens another penalty hearing.

RIPPLE, Circuit Judge, concurring in part and dissenting in part. I agree with the principal opinion in holding that Mr. Stevens' trial counsel was constitutionally ineffective during the penalty phase of the trial, and, therefore, that Mr. Stevens is entitled to a new sentencing proceeding. I write separately because I believe that counsel's shortcomings not only affected Mr. Stevens' sentence, but also his conviction. Therefore, I would grant

habeas relief with respect to his conviction as well as his sentence.

1.

As the principal opinion explains, counsel for Mr. Stevens were aware "that a comprehensive mental health evaluation would be a crucial prerequisite for determining trial strategy, yet after Dr. Lennon failed to provide them with such an evaluation they neglected to consult an alternative health expert." Slip op. at 10. Counsel did not offer any strategic basis for not seeking out additional expert advice, and the State's proffered explanation for the reasonableness of counsel's choices does not suffice to justify their actions. *See id.* The principal opinion, therefore, concludes, correctly, that "[i]n light of Stevens's lawyers' admissions and the overall weakness of the defense they presented at trial, we are inclined to believe that their performance was ineffective." Slip op. at 12.[2]

The principal opinion turns then to *Strickland*'s prejudice prong to determine whether Mr. Stevens' conviction may have been affected by counsel's failure.

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[2] As the principal opinion notes, counsel's sole reliance on a voluntary manslaughter defense is troubling for several reasons. See slip op. at 12. First, the facts as presented to the trial court did not justify a voluntary manslaughter instruction. Second, securing a voluntary manslaughter instruction, like pursuing a mental illness defense, would have opened the door to Eastin's testimony. *See id.* Finally, nothing precluded counsel from pursuing a voluntary manslaughter defense and at the same time presenting evidence of mental illness. Both focus on the defendant's ability to form the requisite criminal intent to commit murder, and the record does not suggest any justification for only pursuing the former course.

After reviewing the standards for mental illness under Indiana law and also the standard for demonstrating prejudice under *Strickland*, the principal opinion concludes that "the Indiana Supreme Court's conclusion that no jury could conclude that Stevens did not appreciate the wrongfulness of his conduct at the time of the murder was not implausible." *Id.* at 14. In other words, the Supreme Court of Indiana's conclusion—that Mr. Stevens had not suffered any prejudice as a result of his counsel's missteps—was not unreasonable.

2.

In reaching this conclusion, I believe that the principal opinion reads the decision of the Supreme Court of Indiana too broadly. With respect to the question of whether trial counsel's investigation of the expert was adequate, the Supreme Court of Indiana concluded: "The trial court determined that defense counsel adequately investigated issues of substance abuse and mental illness and reason-ably chose to pursue a different strategy. The post conviction court did not err in denying relief on this claim." *Stevens v. State*, 770 N.E.2d 739, 749 (Ind. 2002) (footnote omitted). This language speaks in terms of attorney performance—the focus of *Strickland*'s first prong—rather than to prejudice—the focus of *Strickland*'s second prong. Later in its opinion, the Supreme Court of Indiana also addresses counsel's decision to present a voluntary manslaughter theory as opposed to presenting a mental disease defense. After reviewing counsel's actions, the state supreme court again uses language that speaks to the performance inquiry of the first prong of *Strickland*: "The post-conviction court found that counsel's decision to pursue the voluntary manslaughter strategy, while ultimately unsuccessful, did not amount to deficient

performance." *Id.* at 753. And, again, the Supreme Court of Indiana upheld that decision: "We conclude that the evidence as a whole does not lead unerringly and unmistakably to a decision opposite that reached by the post-conviction court, and we find that defense counsel's choice of defense theory did not constitute ineffective assistance of counsel." *Id.* In sum, the Supreme Court of Indiana rested its rejection of the merits of Mr. Stevens' ineffective assistance of counsel claim on *Strickland*'s performance prong; it did not address directly the question of prejudice.

3.

AEDPA instructs that, in the usual case, we apply a deferential standard to a state-court determination that is challenged by way of a habeas petition. *See Canaan v. McBride*, 395 F.3d 376, 382 (7th Cir. 2005) ("Ordinarily, § 2254(d) requires that we determine whether the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court,' or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' "). "This standard only applies, however, to a claim that was adjudicated on the merits in State court proceedings." *Id.* (internal quotation marks and citations omitted). "As a practical matter, a federal court cannot apply the deferential standard provided by § 2254(d) in the absence of any state court decision on the issue." *Id.* This principle is equally applicable to the separate inquiries under each prong of *Strickland*. In the words of the Supreme Court, "our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."

Wiggins v. Smith, 539 U.S. 510, 534 (2003). Thus, because the Supreme Court of Indiana did not reach the question of prejudice, we need not apply AEDPA deference;[3] we

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[3] In addition to considering the decision of the Supreme Court of Indiana, Judge Manion suggests that, in assessing the question of prejudice, we should look at rationale relied upon by the state trial court as well, specifically the state trial court's "finding that the additional psychological evidence altered the nature of the sexual encounters between Stevens and Zachary." Concurring op. at 41-42. Judge Manion acknowledges that "[t]he Supreme Court of Indiana did not specifically mention the different description of the sexual encounter, but never rejected the trial court's findings and twice stated that additional evidence 'would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase.' " *Id.* at 42 (quoting *Stevens v. State*, 770 N.E.2d 739, 753 (Ind. 2002)).

For purposes of our review under AEDPA, the operative state-court decision "is that of the last state court to address the claim on the merits." *Garth v. Davis*, 470 F.3d 702, 710 (7th Cir. 2006). In this case, the Supreme Court of Indiana, although specifically mentioning other evidence that could have been introduced had Mr. Stevens mounted a mental illness defense (namely Eastin's testimony), did not mention the alternative description of Mr. Stevens' last sexual encounter with Zachary. This omission may have been inadvertent, or the evidence may have been encompassed by the reference to "substantial incriminating evidence." However, it also may be the case that the Supreme Court of Indiana did not agree with the trial court's conclusion that the additional facts fundamentally altered the jury's view of the "relationship" between Mr. Stevens and Zachary. One of the rationales for modern statutory rape laws is that sexual relations with a minor, especially one as young as Zachary, are "inherently nonconsensual." *See, e.g., Daryl J. Olszewski*, Comment, Statutory Rape in Wisconsin: History, Rationale & the Need for Reform, 89 Marq. L. Rev. 693, 699(2006). The Supreme Court of Indiana may have concluded that, even absent this evidence that the last encounter was forcible, not consensual, the jury already would

look to see only whether there is a reason able probability that, but for counsel's errors, the result of the trial would have been different.

4.

In this case, the evidence presented at Mr. Stevens' post-conviction hearing established that Dr. Lennon's ideas concerning mental illness were "completely abandoned" by the American Psychiatric Association in the 1980s and that "anyone who subscribes to the 'myth of mental illness' is not really in the mainstream of current thought among professionals." Post Conviction Record ("PCR") at 2015 (testimony of Dr. Kaplan). Mr. Stevens' counsel "had concluded that Dr. Lennon was [a] 'quack,'" but did not engage in further, critical investigation of Dr. Lennon's testimony or his theories that would have led them to seek the assistance of another expert. Slip op. at 20.

Had Mr. Stevens' counsel sufficiently investigated Dr. Lennon's testimony, and, as a result, secured additional expert evaluation, the jury would have been presented with a psychiatric explanation for Mr. Stevens' actions. At the

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have considered Mr. Stevens to be a sexual predator. In short, the jury's view would not have changed with the introduction of this additional evidence.

Thus, even assuming that the Supreme Court of Indiana's commentary on "open[ing] the door to the admission of substantial incriminating evidence," *Stevens*, 770 N.E.2d at 753, is meant to address *Strickland*'s second prong, it is not at all clear that the Supreme Court of Indiana meant to encompass within this statement reference to the state trial court's findings concerning the nature of the relationship between Zachary and Mr. Stevens. Consequently, these findings should not factor into this court's AEDPA analysis.

state post-conviction hearing, Dr. Kaplan testified that, at the time Mr. Stevens committed the offense, "he was laboring under dissociative disorder not otherwise specified, borderline personality disorder, and intoxication from LSD and the aftereffects of marijuana," PCR at 2004,and that Mr. Stevens' capacity to make a personal choice at the time of the crime was "nil," *id.* at 2029. Dr. Coons echoed Dr. Kaplan's diagnoses, *see id.* at 1885-86, and also concluded that, at the time of the offense, Mr. Stevens was "laboring under extreme emotional disturbance" and was impaired in his ability both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct, *id.* at 1891-92. In short, had counsel secured an expert who adhered to mainstream theories within the psychiatric and psychological communities, the expert would have presented evidence establishing the elements of a mental illness defense under Indiana law. *See* slip op. at 13 (quoting Ind. Code § 35-41-3-6).

Given this evidence, I believe that there is at least a reasonable probability that, had the jury been privy to this evidence, its result would have been different. I must respectfully register my disagreement with the principal opinion that, in these circumstances, there is a fundamental difference between mounting an insanity defense and establishing statutory mitigating factors for purposes of capital sentencing. *See* slip op. at 22. Here, the experts not only presented evidence that could establish that Mr. Stevens was operating "under the influence" of a mental disease at the time of the murder—a mitigating factor under Indiana's capital sentencing law, *see* Ind. Code § 35-50-2-9(c)(2), but also that he was "unable to appreciate the wrongfulness of the conduct at the time of the offense"—a defense to the crime, *see* Ind. Code § 35-41-3-6.

Additionally, I believe that the principal opinion overstates the downside to presenting a mental disease defense during the guilt phase. The principal opinion states that "[t]he strategic reasons that might, at a stretch, have justified this decision at the guilt phase, fall apart when we consider that at the sentencing phase Stevens had nothing left to lose." Slip op. at 20. As a practical matter, Mr. Stevens had nothing to lose at the guilt phase. Absent expert testimony that, at the time of the killing, Mr. Stevens' actions were caused by a mental disorder and he was unable to control his actions, the jury was left with no other alternative than to conclude that Mr. Stevens not only chose to engage in predatory pedophilia, but also that he willingly disposed of his victims as dictated by his own interests.

5.

Furthermore, even if the decision of the Supreme Court of Indiana, either by itself or in conjunction with the post-conviction trial court's decision, *see Stevens*, 770 N.E.2d at 749 n.5, could be construed as reaching *Strickland*'s prejudice prong, I could not join the principal opinion's conclusion that the decision of the Supreme Court of Indiana was a reasonable one. The expert testimony during the post-conviction hearing shows that Mr. Stevens' upbringing was "a recipe for developing someone with a dissociative disorder." PCR at 2020. Both experts testified that this disorder, in conjunction with Mr. Stevens' other infirmities, caused him to kill Zachary and prevented him from recognizing the wrongfulness of his actions. Additionally, Dr. Kaplan explained how the nature of Mr. Stevens' disorders and the events leading to the killing of Zachary were inconsistent with premeditation. Because the testimony of competent experts would have explained Mr. Stevens' actions in terms of his

mental illness and also would have diminished the impact of any inculpating evidence of premeditation, I do not believe that a determination that Mr. Stevens was not prejudiced by his counsel's lapse of judgment could be characterized as a reasonable one.

Conclusion

For the foregoing reasons, I not only would grant Mr. Stevens habeas relief with respect to his sentence, I also would grant the writ with respect to his conviction. On this ground, I respectfully dissent in part from the judgment of the court.

MANION, Circuit Judge, concurring in part and dissenting in part. I join the opinion of the court as to part II-C regarding the claims concerning the stun belt and discovery issues. I concur with Judge Wood in denying habeas relief from the conviction, but write separately to explain my agreement with the state court's reasoning. I respectfully dissent from the granting of habeas relief for the death penalty sentence because I conclude that the state court's decision denying collateral relief did not include unreasonable determinations of the facts and was not contrary to or an unreasonable application of Supreme Court precedent.

In May 1993 Christopher Stevens was released on probation from the Marion County jail in Indiana where he had been serving a sentence for child molestation. He moved in with his father, whose home was in the same subdivision as that of ten-year-old Zachary Snider's family. In the early summer, Stevens attended and video taped one of Zachary's Little League games and later, with his father's permission, took Zachary fishing. Stevens's relationship with Zachary culminated in sexual contact

with him. Because a fuller recitation of the facts is significant to evaluating and understanding the Supreme Court of Indiana's decision, the following is a portion of that court's factual findings:

> In the videotaped confession . . . Stevens told the officers that on Thursday, July 15, Zachary visited Stevens in the early afternoon, but stayed only for a short time, saying that he would return after he had picked up some money, talked to his father, and changed his clothes. When he returned, Zachary and Stevens talked for a while as Stevens flipped through the channels on his television, and then the two went to Stevens' bedroom and "messed around," which mainly included the two performing fellatio on each other but never anal sex. This activity was not new to the pair, as they had had an ongoing sexual relationship since shortly after Stevens returned to Stardust Hills after serving his time in the Marion County jail. After they "did stuff for awhile," Zachary angrily confronted Stevens with a rumor he had heard concerning Stevens having sexual relations with Zachary's mother. Because of this rumor, Zachary threatened to reveal Zachary and Stevens' sexual relationship to his parents. This threat made Stevens "real scared." He stated,
>
> > He said, he, he threatened to tell . . . about me and him, and, uh, I'd just went through a bunch of [expletive] in Indy, and that was just, just on my mind. I was like, I just didn't want to, thinking to myself, you know, I just can't go through all that [expletive] again.

After Zachary's threat, the two "messed around some more," which Stevens again stated meant "having sex." Once finished, Stevens led Zachary by the hand into his brother's room and the two got onto the bed. Stevens took one of his brother's pillows and placed it over Zachary's face in an attempt to suffocate him. Zachary did not really resist; rather, "he just kept sayin' 'I love you, Chris; I love you, Chris.'" Because the pillow "wasn't doing anything," Stevens looked around the room and noticed a Sega Genesis controller on the floor. He picked it up and, using the cord, wrapped it around Zachary's neck, at first just once but then two or three times, and strangled the boy. When Stevens "thought it was all over," he removed the cord from Zachary's neck and proceeded to pace back and forth between Stevens' brother's bedroom and his own room looking at Zachary's body and contemplating what he would now do.

About five minutes later Zachary, while still unconscious, began to take deep breaths. So, Stevens said, "I went [into my kitchen] and got a trash bag and put it over his head and wrapped it around his head, he was unconscious so, you know, I knew he wouldn't be ripping it off his face and stuff." Once the child had suffocated, Stevens carried Zachary from his brother's bedroom into his own room and laid the boy's body on his bed. Stevens later revealed to a psychologist for the defense that he killed for fear of having to return to prison brought on by Zachary's threat to tell.

Stevens then went out to the garage, pulled a trailer, lawn mower, and grill onto the driveway to make room for his car, brought his car into the garage, and shut the garage door. He then placed Zachary's bike[4] in the back of the car, went in and got Zachary's body and placed it also in the back of his car, and then covered them both with a cover. Stevens then described in detail how he drove out into the country and threw Zachary's body and bike over a bridge, naming the roads he took to reach the remote location. Initially, the bike got caught in a tree "where anybody could see it if they walked by or drove by," so Stevens "jumped down there" and pulled both Zachary's body and bicycle beneath the bridge. In relating his state of mind during the murder and immediately thereafter, he described himself as "nervous and scared," "all frantic" and "not really thinking."

Once home, Stevens telephoned Mark White to request help in pushing the trailer in his driveway back into his garage. After White assisted Stevens and left, Stevens placed the mower and grill back in the garage, and went back inside his house. Later that evening, Stevens took a can of Lysol and sprayed down his car, the cover used in the car to conceal the body and bike, and his and his brother's beds. He also played basketball with White, during

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[4] [Footnote in original.] Zachary's bike was already in the garage because, Stevens stated, "whenever he comes over I have him put his bike in the garage [. . .] so [ ] nobody will see his bike there."

which time he saw the Sniders driving around the neighborhood looking for Zachary. When he and White finished playing basketball, Stevens called Mrs. Snider to learn the status of their search for Zachary, but did so under the guise of inquiring about some rock concert tickets. During this call, Mrs. Snider asked if Stevens had seen Zachary that day, to which Stevens said, "No." Mrs. Snider then revealed that Zachary was missing, and Stevens offered to help them look. Mrs. Snider replied that she would call him if they needed his help. Although she never called back, Stevens went over to their home just before 9 p.m. As he talked with Mrs. Snider, he saw a policeman arrive and walk up the Sniders' driveway. Because Stevens "didn't want to be around the cop," he told Mrs. Snider that he would "go check a couple of places" and quickly departed. Stevens then went to various houses asking the occupants if they had seen Zachary.

Later that night Stevens returned to Zachary's body because he recalled leaving the plastic trash bag wrapped around Zachary's head. Stevens stated, "I went back out there to get the trash bag cause, I figured if you guys [the police] seen the trash bag and looked in our house and seen the same kind of trash bags and, and stuff." Stevens described the trash bag as one with handle ties, green outside and black inside. Upon recovering the bag, Stevens drove away from the scene and, after traveling some distance, threw the bag out of his window. Upon returning to Stardust Hills he again went to the Sniders' house and inquired whether

they had heard anything yet, telling them he was up at that late hour because he was having trouble sleeping.

After the confession, the police searched for the trash bag mentioned by Stevens. They found one matching Stevens' description on the side of the road about a mile from where the body was located. While other bags observed during their search all contained trash, this one contained only road dust and debris, and appeared to have "at one time contained something that caused it to be stretched out," Later that same day, pursuant to a search warrant, police found similar trash bags and a Sega Genesis video game and controllers in Stevens' home.

The body found by police under the bridge was later identified through dental records as that of Zachary Snider. Also, Mr. Snider later identified the bike found with the body to be Zachary's. The pathologist who performed the autopsy, though unable to determine the cause of death because of the state of decomposition, observed no evidence inconsistent with death by either strangulation or suffocation. He found no broken bones and no evidence of any penetrating injury to the torso or lower extremities. When asked about the potential for a natural cause of death, the pathologist replied that the tissues of the heart, lungs, liver, and kidneys available for examination showed no signs of disease. The forensic entomologist who examined insect samples found in the body and in the soil under the bridge placed the time of death sometime between noon and sunset on July 15.

Stevens v. State of Ind., 691 N.E.2d 412, 418-19 (Ind. 1997) (internal citations to the record omitted). Stevens was charged with first degree murder, and trial preparations and proceedings followed. The principal issue in this appeal involves the expert testimony of a psychologist, Dr. Lawrence Lennon. Dr. Lennon did not testify at the guilt phase of the trial, only during the penalty phase and at sentencing. Stevens claims that his counsel was ineffective at both the guilt and penalty phases for retaining only Dr. Lennon, whom Stevens characterizes as an inadequate and prejudicial expert. The state court denied post-conviction relief on this basis.

To obtain habeas corpus relief in this court under AEDPA, Stevens must show that the state court's determination was contrary to or an unreasonable application of Supreme Court precedent, or an unreasonable determination of the facts. Central to this appeal is the familiar case of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a petitioner claiming ineffective assistance of counsel to demonstrate both constitutionally deficient performance and prejudice. In ineffective assistance of counsel claims, this court has explained that,

> [if] a state court has denied a *Strickland* claim on the merits, under the AEDPA we generally review for clear error. As we noted in *Holman v. Gilmore*, "*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . . . This means that only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." 126 F.3d 876,881-82 (7th Cir. 1997). This is because "*Strickland* builds in an element of deference to counsel's choices in conducting the litigation

> [and] § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard." *Id.*

United States ex rel. *Bell v. Pierson*, 267 F.3d 544, 557 (7th Cir. 2001) (emphasis added). We therefore review for clear error in the Supreme Court of Indiana's decision.

With respect to *Strickland*'s performance prong, I am not "inclined to believe that [trial counsels'] performance was ineffective," at the guilt stage as Judge Wood's opinion suggests. Ante at 12. Nonetheless, I agree with Judge Wood that the state court did not clearly err in applying Supreme Court precedent regarding the guilt phase of the trial because Stevens was not prejudiced by his counsels' performance. The Supreme Court of Indiana cites the correct standard to evaluate prejudice under *Strickland*, specifically noting that Stevens must demonstrate "that his counsels' errors were so serious as to deprive him of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Stevens v. State of Ind.*, 770 N.E.2d 739, 746 (Ind. 2002) (citing inter alia *Strickland*, 466 U.S. at 694). The Supreme Court of Indiana further clarified that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. at 694). Of course, "more than a correct citation is needed to avoid a decision 'contrary to' clearly established federal law." *Burgess v. Watters*, 467 F.3d 676, 683 (7th Cir. 2006). The state court, however, proceeded to apply this standard, concluding that an alternative mental illness defense at the guilt phase "was not without its pitfalls" because this defense

> would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase. This evidence included testimony of a witness

> that, upon the defendant's prior release from jail onto probation for a previous conviction of child molesting, the defendant had declared that he planned to kill his next child molesting victim to avoid returning to jail.

Id. at 749; *see also id.* at 753. Furthermore, the Supreme Court of Indiana noted that one of Stevens's post-conviction experts, Dr. Coons, "acknowledge[ed] that [Stevens] could appreciate the wrongfulness of his conduct when he took steps to hide Zachary's body." *Id.* at 749 n.5. Based on this additional evidence, the Supreme Court of Indiana noted that Dr. Coons's testimony "would have had little or no effect on the jury's verdict . . . ." *Id.*

Another piece of incriminating evidence that would have come into evidence through the additional mental health experts is a different description of the nature of the sexual encounters between Stevens and Zachary. The state trial court made a finding that the additional psychological evidence altered the nature of the sexual encounters between Stevens and Zachary. The understanding at trial had been that the molestation was "consensual," but the testimony of Drs. Kaplan and Coons during the state post-conviction hearing reveals a different story. According to Dr. Kaplan, Zachary and Stevens were

> wrestling around as play, and then [Stevens] grabbed his shorts and, well, Zachary I think hit . . . Steven[s]'s penis, and then [Stevens] grabbed his shorts, pulled them down, and at that point, again, you know, he—he had then forced himself on Zachary, made him, you know, suck his penis, and . . . they had sexual relations. And then after the sexual relations were concluded, Zachary told him, you know, "I'm going to tell my mother about what you

> did to me." And then, again, he saw Zach as the victimizer now.

Kaplan earlier in his testimony provided the following analysis:

> In [Stevens'] mind, he was a seducer of children, not a forced raper of children. So as long as he saw this as what he felt to be consensual, he didn't see anything wrong with it. And that's probably the greatest problem for him with the Zachary murder is that this was the first time he had forced himself on another child and forcibly had sex. And to him, that was very, very incongruent with his concept of who he was and what sexual molestation is.

The Supreme Court of Indiana did not specifically mention the different description of the sexual encounter, but never rejected the trial court's findings and twice stated that additional mental illness evidence "would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase." *Stevens*, 770 N.E.2d at 753; *see also id.* at 749. In sum, the state court's determination that Stevens did not suffer prejudice from his counsels' performance at the guilt phase is not contrary to or an unreasonable application of Supreme Court precedent. I therefore agree with Judge Wood that Stevens is not entitled to habeas relief from his conviction.

Proceeding to the penalty phase, just as the state court did not err in upholding the conviction, the state court similarly did not err in denying relief from the death penalty sentence. I therefore respectfully disagree with Judges Wood and Ripple regarding habeas relief from the death penalty sentence.

The Supreme Court of Indiana concluded that the trial attorneys "investigated the mental health issues through

the use of Dr. Lennon." *Stevens*, 770 N.E.2d at 755. The court further quoted with approval the trial court's finding that " '[d]efense counsel's investigation of Petitioner's mental health and prior use of drugs was reasonable' " and that defense counsel pursued a " 'strategy of portraying the petitioner as a passive victim of abuse' " at the penalty phase. *Id.* at 754. Furthermore, the state trial court found that based on the fuller description of Stevens' relations with Zachary that the new experts offered, "[t]he jury would not consider such a violent, voracious predator as someone deserving a penalty less than death." *See* Stevens Supp. App. at 65.

In his penalty phase testimony, Dr. Lennon testified regarding Stevens's emotional immaturity and the impact of abuse and his mother's use of drugs and alcohol on Stevens's development. This mitigation testimony was in addition to testimony from a variety of Stevens's relatives and individuals who could testify about and provide documentation regarding his deplorable childhood. In this case, the Supreme Court of Indiana found that Stevens's counsel "presented various witnesses and evidence showing various mitigating circumstances including his parents' divorce and his living in the homes of different people while growing up, the defendant's troubled childhood including suffering childhood sexual abuse, his adolescent alcohol and drug use and diagnoses of passive personality, his depression and suicide attempts, and his poor academic performance." *Stevens*, 770 N.E.2d at 753; cf. *Woods v. McBride*, 430 F.3d 813, 825 (7th Cir. 2005) (noting that "[c]ounsel in this case actually presented mitigation evidence during the penalty phase rather than a half-hearted attempt to deflect culpability from the defendant.") (citing *Wiggins v. Smith*, 539 U.S. 510, 515-18, 526 (2003)). In the context of challenging a death penalty sentence, "the question is whether there is a reasonable

probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The prosecutors argued for three aggravating factors warranting the death penalty, which the jury each found to be proven beyond a reasonable doubt: that the defendant committed the murder by intentionally killing the victim while committing child molestation, that the victim was under the age of twelve, and that the defendant was on probation after a felony conviction. The Supreme Court of Indiana was "not persuaded that the evidence in the record unavoidably points towards an opposite result" from the state trial court's conclusion that counsel were not ineffective. *Stevens*, 770 N.E.2d at 755. Under the deferential standard of AEDPA, this is not a decision that is contrary to or an unreasonable application of Supreme Court precedent.

It is true that Dr. Lennon failed to follow counsels' instructions not to prepare a report, responded to the prosecutor's unexpected question regarding necrophilia, and discussed his unusual form of therapy. He was not a very good witness. Yet, his performance at the penalty phase (his first testimony in the case, since he did not testify at the guilt phase), does not render Stevens's counsels' performance ineffective. More importantly, the Supreme Court of Indiana's conclusion that counsel performed reasonably is not an unreasonable application of Supreme Court precedent. Therefore it does not follow that the jury or judge "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" if faced with additional expert testimony presenting the diagnosis of disassociation. *Strickland*, 466 U.S. at 695. Having reviewed the videotaped confession as well as the record, I do not find that the state court's determination was unreasonable.

Consequently, I respectfully dissent from granting habeas relief on the death penalty sentence.

A true Copy:

Teste:

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Clerk of the United States
Court of Appeals for the
Seventh Circuit

USCA-02-C-0072—6-18-07

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

CHRISTOPHER M. STEVENS,	)	CAUSE NO. 4:03-CV-005 AS
Petitioner,	)	
v.	)	
DANIEL McBRIDE,	)	DEATH PENALTY CASE
Respondent.	)	

MEMORANDUM AND ORDER

This proceeding is a petition filed by counsel on behalf of the petitioner, Christopher M. Stevens, seeking relief under 28 U.S.C. § 2254 from a state court criminal proceeding in which he was sentenced to death. An extended oral argument, lasting nearly 2 hours, was held on the petition in South Bend, Indiana on December 6, 2004. This court greatly appreciates the professional services of appointed counsel for Mr. Stevens.

Two published opinions of the Supreme Court of Indiana will provide the basic factual setting of this case. In *Stevens v. State*, 691 N.E. 2d 412 (Ind. 1997), the unanimous decision of the Supreme Court of Indiana was written by Chief Justice Shepard and entered on December 31, 1997. In *Stevens v. State*, 770 N.E. 2d 739 (Ind. 2002), the unanimous decision of the Supreme Court of Indiana was written by Justice Dickson and entered on June 26, 2002. The massive state record has been filed and

examined here pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963), as well as 28 U.S.C. § 2254.

I. STANDARD OF REVIEW

> [U]nder § 2254(d) it must be shown that the [state] Supreme Court's decision was either contrary to, or an unreasonable application of, [the United State Supreme Court's] clearly established precedents, or was based upon an unreasonable determination of the facts.

Price v. Vincent, 538 U.S. 634, 639 (2003).

> [A] decision by a state court is "contrary to" our clearly established law if it "applies a rule that contradicts the governing law set forth in our cases or if it confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Price, 538 U.S. at 640. (Quotation marks omitted.)

> [T]he phrase "clearly established Federal law, as determined by the Supreme Court of the United States" . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.

Williams v. Taylor, 529 U.S. 362, 412, (2000).

> [A]s the statutory language makes clear, . . § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.

Williams, 529 U.S. at 412.

> As we have explained, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied a [United States] Supreme Court case incorrectly. Rather it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner.

Price, 538 U.S. at 641 (quotation marks, citations and brackets omitted). *See also Early v. Packer*, 537 U.S. 3 (2002), *Woodford v. Visciotti*, 537 U.S. 19 (2002), and *Wiggins v. Smith*, 539 U.S. 510 (2003)

Thus, the United States Supreme Court has made clear that it is not for this court to decide the merits of the petitioner's arguments from scratch. Rather, the task laid out before this court in a § 2254 habeas corpus petition is to determine whether the decision of the state court, in this case the Indiana Supreme Court, falls outside of that broad swath of reasonable interpretations of the law based solely on the holdings of United States Supreme Court opinions at the time of the state court decision.

II. LETTER REQUESTING DISMISSAL

As a preliminary matter, the petitioner, acting pro se, wrote a handwritten letter to this court asking that this case be dismissed. Given that the court is now denying this habeas corpus petition on the merits, the question of dismissal is rendered moot.

III. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The petitioner, in his first three claims for relief, argues that his trial counsel were ineffective for many reasons. The clearly established law on the Sixth Amendment was presented in *Strickland v. Washington*, 466 U.S. 668 (1984).[5] In order to prevail on an ineffective assistance claim, the petitioner must establish two elements: first, that counsel's performance fell below an objective standard of reasonably effective representation; and second, that the "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. For the first prong, the petitioner must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, 466 U.S. at 690. On the second prong, the petitioner must show a "reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

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[5] Though the petition contains citations to *Wiggins v. Smith*, 539 U.S. 510 (2003), this case postdates the Indiana Supreme Court cases and is therefore inapplicable to the analysis at hand.

A.

The petitioner argues that, "delays in the investigations impacted the defense's ability to prepare and secure necessary experts". Petition at 20, docket # 18. The Indiana Supreme Court addressed this claim in reviewing the denial of his post-conviction relief petition.

> The defendant claims, in part, that his counsel unreasonably delayed their investigation. Stevens was tried for murder in January 1995, within seventeen months of his arrest in July 1993. Defense counsel entered their appearances in August 1993. In November 1993 counsel made their first request for funding for experts. This request was granted in May 1994 along with funds for an investigator. Funding for mitigation investigation was secured in January 1994, and a mitigation specialist joined the defense. Defense counsel periodically requested additional amounts for the mitigation, fact, and expert witnesses. Such funding requests were approved. Billing records indicate that information was being gathered, procedural issues were being worked out with the prosecutor and the court, and research was being done on legal issues during the three months before the first funding request. Because of successful motions for continuance, Stevens was not tried until seven months after the time counsel added the psychologist and the fact investigator to their team of a paralegal and mitigation investigator. These facts do not compel a finding of deficient performance in the timing of trial counsel's investigation.

Stevens v. State, 770 N.E. 2d 739, 748 (Ind. 2002) (footnote and citation omitted). The Indiana Supreme court reviewed the pre-trial history of this case and examined the chronological relationship of the events in question. Despite some initial delays, the court found that the fully constituted defense team had seven months to prepare for trial because of counsel's success in postponing the trial. In light of the curative effect of the continuances, it was not an unreasonable application of *Strickland* for the Indiana Supreme Court to hold that these investigative delays were within the range of professionally competent assistance and that they did not render trial counsel ineffective.

B.

The petitioner argues that, "defense counsel secured the services of an incompetent expert without making any effort to familiarize themselves with the potential expert's forensic approach" (petition at 22, docket # 18); that "Dr. Lennon's 'specialty' was not relevant to Christopher Stevens" (petition at 25, docket # 18); that "Dr. Lennon was retained under fraudulent circumstances" (petition at 27, docket # 18); and that "defense counsel were aware that Dr. Lennon's 'myth of mental illness' views were far outside the professional 'mainstream.'" (petition at 27, docket #18). The Indiana Supreme Court addressed these claims related to expert competence and trial counsel's investigation thereof in the appeal from the denial of his post-conviction relief petition.

> Dr. Lennon had been recommended by the mitigation investigator. Other members of the criminal defense community also told Stevens's attorneys that Dr. Lennon had done a "very nice job" in testifying in another death penalty case. Dr. Lennon holds a Ph.D. in clinical Psychology from Miami University in Ohio.

> He was a psychology professor at St. Joseph's College, where he spent four years as the chair of the Psychology Department, and was clinical director of the Child and Adolescent Psychiatric Center at Humana Hospital in Indianapolis from 1991 to 1994. Dr. Lennon conducted a preliminary evaluation of the defendant prior to April 13, 1994 and met with him five times from June through December 1994. Dr. Lennon also met with the defendant's parents and siblings, and reviewed school records, records from the Hamilton Center, and arrest records. Other individuals from Dr. Lennon's office, including a social worker and another psychologist, participated in evaluations of the defendant. Defense counsel considered Dr. Lennon a good fit because of his expertise in treating children and adolescents, and the defendant's attorneys sought and received a transcript of Dr. Lennon's testimony in a case the attorneys felt had similar issues.

Stevens v. State, 770 N.E. 2d 739, 747-48 (Ind. 2002). It was not unreasonable for the Indiana Supreme Court to have found that Dr. Lennon was a competent expert. He possessed the necessary professional credentials and he examined and evaluated the defendant. It is widely known that there is a great range of opinion within the psychological community. Though the petitioner believes that he could have obtained a more advantageous expert, based on these facts, it was not unreasonable for the Indiana Supreme Court to have found, without regard to his specialties or his approach to psychology, that he was a competent expert. Neither was it an unreasonable application of *Strickland* for the Indiana Supreme Court to

hold that the degree to which trial counsel familiarized themselves with Dr. Lennon's credentials, though certainly they could have done more, was within the range of professionally competent assistance.

C.

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The petitioner presents several arguments about Dr. Lennon's report and testimony. Prior to knowing about Dr. Lennon's 'specialty' or that he fell far outside the professional mainstream of mental health experts, counsel guaranteed that Dr. Lennon would generate a report that would be provided to the State. Petition at 24, docket # 18. From "out of the blue" Dr. Lennon generated a completely unauthorized report without consulting counsel as to the content of that 'report.' Petition at 39, docket # 18 (emphasis in original). Objectively, counsel should never obtain a report from an expert without knowing what is going to be in it. Petition at 42, docket # 18. Dr. Lennon devised his own 'strategy' that mandated his unilateral decision to testify at trial. Petition at 58, docket # 18. Defense counsel called Dr. Lennon as a penalty phase witness without knowing about what he intended to testify. Petition at 59, docket # 18. Dr. Lennon's penalty phase testimony, anchored in the information and opinions served up in the unauthorized 'report,' introduced the issue of 'future dangerousness' into the penalty phase. This was highly prejudicial to Mr. Stevens. Petition at 60, docket # 18. The Indiana Supreme Court addressed these claims in the appeal from the denial of his post-conviction relief petition.

The defendant also faults his trial counsel for providing a copy of Dr. Lennon's report to the State prior to trial. We note, however, that the report was provided in compliance with the trial court's order that any reports

from experts [were] to be submitted to the State sixty (60) days in advance of trial. On motion of the defense, the trial court extended the deadline for the exchange of reports from experts to July 19, 1994. The defense thereafter supplied the report.

Stevens v. State, 770 N.E. 2d 739, 748 n.4 (Ind. 2002) (quotation marks and citations omitted).

Citing Ake v. Oklahoma, 470 U.S. 68 (1985), the petitioner argues that the Indiana Supreme Court was unreasonable in finding that trial counsel were not ineffective for agreeing to provide a copy of the report to the State. This was not unreasonable because Ake did not require a confidential psychological report.

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Ake v. Oklahoma, 470 U.S. 68, 83 (1985). It was not an unreasonable interpretation of Ake for Indiana to require disclosure of the report. Obviously, if disclosure was required, then so too was the creation of the report;

therefore it was not created "out of the blue". Though it is self-evident why defense counsel would like the opportunity to shape and tailor both the psychological report and Dr. Lennon's testimony, Ake did not create such requirements. Indeed, Ake made clear that an indigent defendant did not have "a constitutional right to choose a psychiatrist of his personal liking . . .." *Ake*, 470 U.S. at 83.

D.

The petitioner presents several arguments concerning intent and the voluntary manslaughter defense versus a mental illness defense.

> By defending this case in accordance with the views of Dr. Lennon[,] defense counsel conceded any possible defense that would question Mr. Stevens' "intent" during the commission of the homicide. This was in spite of the fact that counsel were aware of facts that impacted upon the question of the Mr. Stevens' "intent."

Petition at 30, docket # 18.

> Defense counsel failed to properly investigate Petitioner's substance and alcohol abuse, failed to develop this evidence, and failed to seek or secure the services of an alcohol and substance abuse expert.

Petition at 35, docket # 18.

> In spite of recognizing these shortcomings of Dr. Lennon, and realizing that the defense needed additional experts to defend the case, defense counsels [sic] never sought additional funding to secure other experts.

Petition at 43, docket # 18 (emphasis in original).

> Defense counsels [sic] adopted a theory of defense that did not focus upon the issue of Mr. Stevens' "intent" at the time of the homicide. The defense of 'Voluntary Manslaughter' was not supported by any facts as counsel knew them to be or law. Defense counsel did not know the law.

Petition at 45, docket # 18.

> It was unreasonable and prejudicial for defense counsel to proceed with the untenable 'voluntary manslaughter' defense given that a viable mental illness defense was available.

Petition at 47, docket # 18.

> Petitioner was prejudiced by trial counsel's use of the untenable 'voluntary manslaughter' defense. Even if counsel had only been able to secure a 'guilty but mentally ill' verdict, such would have been a circumstance rendering the death penalty inappropriate.

Petition at 50, docket # 18. The Indiana Supreme Court addressed these claims at length in its review of the denial of his post-conviction relief petition.

> During the guilt phase trial, the defense strategy was to urge that the killing was done in sudden heat and thus, if the defendant were guilty, he was guilty of voluntary manslaughter and not murder. At post-conviction, defense counsel testified that this was one of the alternative theories they had been considering from "day one," and when Stevens's

> confession was not suppressed, voluntary manslaughter became the theory of the case. Counsel based this theory on a statement in the defendant's confession that he "snapped" or "went off." Defense counsel tendered an instruction on voluntary manslaughter, which the trial court refused to give. During closing argument, defense counsel nevertheless asked the jury to return a verdict of voluntary manslaughter.
>
> While the defendant argues in retrospect that a mental illness defense would have been more effective, his proposed avenue was not without its pitfalls. The post-conviction court noted that, had defense counsel pursued this defense, they would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase. This evidence included testimony of a witness that, upon the defendant's prior release from jail onto probation for a previous conviction of child molesting, the defendant had declared that he planned to kill his next child molesting victim to avoid returning to jail. The trial court determined that defense counsel adequately investigated issues of substance abuse and mental illness and reasonably chose to pursue a different strategy. [FN5] The post-conviction court did not err in denying relief on this claim.

Stevens v. State, 770 N.E. 2d 739, 749 (Ind. 2002) (citations omitted). In footnote 5, the court stated.

> The post-conviction court concluded, in part: With the benefit of hindsight, Petitioner's

> present counsel suggest that trial counsel should have adopted the defense of mental disease or defect (Ind. Code § 35-41-3-6) and should have presented psychiatric evidence that Petitioner was unable to form the mens rea necessary to commit intentional murder. However, if Petitioner had raised the insanity defense, he would have opened the door to the admission of incriminating evidence that was not presented during the guilty [sic] phase of his trial . . .. Moreover, the facts of the crime itself militate against insanity . . .. Against this backdrop, Dr. Coons's testimony that, in his opinion, Petitioner's ability to appreciate the wrongfulness of his conduct was "impaired" would have had little or no effect on the jury's verdict, particularly in light of Dr. Coons's acknowledgment that Petitioner could appreciate the wrongfulness of his conduct when he took steps to hide Zachary's body.

Stevens v. State, 770 N.E. 2d 739, 749 n.5 (Ind. 2002) (ellipsis in original, citation omitted). Finally, in a section titled, "Pursuing Voluntary Manslaughter as Defense Theory", the court concluded its discussion.

> The defendant claims that his trial counsel were ineffective for pursuing a "fundamentally flawed" approach to the case by proceeding on a theory of voluntary manslaughter. They tendered three proposed instructions that dealt with voluntary manslaughter, but these were rejected by the trial court. The defendant argues that there was no evidence in the record to support this theory, and that there was another viable defense available but not used.

The defendant urges that, if defense counsel had consulted other mental health experts, counsel would have learned of the defendant's dissociative disorder, borderline personality disorder, chemical dependency, and LSD impairment at the time of the offense. In the post-conviction proceedings and in this appeal, the defendant's present counsel assert that the defendant was raped as a child; that at the time of the killing the defendant switched his identity with that of Zachary; that the defendant killed Zachary because it's what he would have wanted in that molestation at age 10, to have been killed by his abuser; and that the defendant's ability to appreciate the wrongfulness of his conduct was disengaged when he was dissociating. The defendant argues further that, even if the voluntary manslaughter defense were regarded as legitimate strategy, this would not excuse the failure to present the mental illness defense.

The post-conviction court found that counsel's decision to pursue the voluntary manslaughter strategy, while ultimately unsuccessful, did not amount to deficient performance. The court pointed out that any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter, and that sudden heat is defined as provocation arising from a variety of emotions. In the defendant's admissions of guilt to his brother, the defendant said that he "clicked" or "went off" when Zachary threatened to tell his parents about the defendant's sexual conduct. In the defendant's confession to police, he stated that

> he killed Zachary because he was afraid that Zachary would report him. Concluding that the defendant received effective assistance of counsel as to their strategy to pursue voluntary manslaughter instructions, the post-conviction court found that the defendant's trial attorneys pursued the most viable defense available to them.
>
> As to the failure to present a mental illness defense during the guilt phase, the post-conviction court noted that, had defense counsel done so, they would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase. As we noted above, this included testimony that, upon the defendant's prior release from jail to probation for a previous conviction of child molesting, the defendant had declared his intent to kill his next child molesting victim to avoid returning to jail.
>
> We conclude that the evidence as a whole does not lead unerringly and unmistakably to a decision opposite that reached by the post-conviction court, and we find that defense counsel's choice of defense theory did not constitute ineffective assistance of counsel.

Stevens v. State, 770 N.E. 2d 739, 752-53 (Ind. 2002) (brackets, quotation marks, and citations omitted).

It was not unreasonable for the Indiana Supreme Court to find that pursuing a mental illness defense was fraught with pitfalls and would have had little or no effect on the jury's verdict. Neither was it an unreasonable interpretation of *Strickland* for the Indiana Supreme Court to have held that trial counsel were not ineffective even though they pursued a manslaughter defense and did not

pursue a mental illness defense. Though the manslaughter defense was unsuccessful, fraught with similar pitfalls as the mental illness defense, and not supported by the evidence which was presented at trial; there are simply some cases for which there is no good defense. *See Florida v. Nixon*, ___ U.S. ___, 125 S.Ct. 551 (2004).[6] Trial counsel cannot be deemed ineffective merely because they drew a case with horrific facts which lacked a viable legal theory.

E.

The petitioner argues that "inconsistent state court rulings regarding Mr. Stevens' counsels' [sic] pursuit of a voluntary manslaughter defense support a finding of ineffective assistance of counsel." Petition at 53 (docket # 18). The petitioner argues that it was inconsistent for the Indiana Supreme Court, in his *Florida v. Nixon*, ___ U.S. ___, 125 S.Ct. 551, 562 (2004) (quotation marks, brackets, citations and footnotes omitted.) direct appeal, to have affirmed the trial court's refusal to give a voluntary manslaughter instruction and then to have refused, in his post-conviction relief petition, to find his trial counsel ineffective for having pursued the voluntary manslaughter

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[6] Defense Counsel's "concession of Nixon's guilt does not rank as a failure to function in any meaningful sense as the Government's adversary. Although such a concession in a run-of-the-mine [sic] trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, avoiding execution may be the best and only realistic result possible.

defense. Procedurally, this argument is unsuccessful because neither this court nor the Indiana Supreme Court on post-conviction review, were directly presented with the question of whether the voluntary manslaughter instruction should have been presented to the jury. On post-conviction review, the Indiana Supreme Court stated,

> The post-conviction court found that counsel's decision to pursue the voluntary manslaughter strategy, while ultimately unsuccessful, did not amount to deficient performance. The court pointed out that any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter, and that sudden heat is defined as provocation arising from a variety of emotions. In the defendant's admissions of guilt to his brother, the defendant said that he "clicked" or "went off" when Zachary threatened to tell his parents about the defendant's sexual conduct. In the defendant's confession to police, he stated that he killed Zachary because he was afraid that Zachary would report him. Concluding that the defendant received effective assistance of counsel as to their strategy to pursue voluntary manslaughter instructions, the post-conviction court found that the defendant's trial attorneys pursued the most viable defense available to them.

Stevens v. State, 770 N.E. 2d 739, 753 (Ind. 2002) (brackets, quotation marks, and citations omitted). Based on this passage, the petitioner appears to conclude that the post-conviction court believed that the voluntary manslaughter instruction should have been given to the jury. Perhaps it did, and perhaps it would have granted the post-conviction relief petition had that question been squarely presented to it. Procedurally, that issue is forfeit because it was not

directly raised to either the post-conviction court nor to this one. Yet before anyone second guesses the post-conviction strategy, it must be noted that substantively the language of this passage from the Indiana Supreme Court does not lead unequivocally to the conclusion that it believed its prior ruling was in error.

The post-conviction court speaks of "any appreciable evidence of sudden heat" and it gives two examples of how trial counsel may have believed that they had such evidence. It then concludes by saying, not that trial counsel's strategy was outstanding, but rather that it was the best they had. As previously discussed, this case was so fraught with problems, they did not have much with which to work. Therefore, though the trial court, the Indiana Supreme Court on direct appeal, and the prior caselaw all held that the voluntary manslaughter defense was inapplicable here, trial counsel's selection of this unsuccessful defense and direct appellate counsel's inability to convince the Indiana Supreme Court to broaden the voluntary manslaughter defense did not render them ineffective.

F.

The petitioner argues that "having introduced evidence as to their client's future dangerousness, defense counsel failed to adequately address the issue of life without parole." Petition at 61 (docket # 18). The Indiana Supreme Court addressed this claim in reviewing the denial of his post-conviction relief petition.

> The defendant contends that his trial counsel were deficient for failing to tender a penalty phase instruction that would have informed the jury of the "true effect" of life without parole. He argues that such an instruction was needed to offset the possibility

> that a juror might believe that if sentenced to life without parole, the defendant could be released early. The defendant argues that such an explanation should have been provided because there had been evidence on the issue of future dangerousness and because his trial counsel allegedly provided misguided speculation during jury selection when responding to a potential juror's question concerning the meaning of life without parole.
>
> The post-conviction court's decision noted that it is unnecessary to instruct juries on words that are commonly understood. The court found that "life without the possibility of parole" consists of common words that may be easily understood by persons of average understanding. It also found that had any such instruction been tendered it would have been refused. The post-conviction court concluded that the defendant had received effective assistance of counsel as to this claim. We agree and decline to find ineffective assistance of trial counsel on this issue.

Stevens v. State, 770 N.E. 2d 739, 755-56 (Ind. 2002) (citations, footnote and quotation marks omitted).

Citing *Simmons v. South Carolina*, 512 U.S. 154 (1994), the petitioner argues that he "was denied his right to have the jury informed of the true effect of one of the sentencing options." Petition at 64, docket # 18. In *Simmons*, the trial court refused to inform the jury that the defendant would not be eligible for parole and the United States Supreme Court held that juries must be so informed when that is a sentencing option. It was not unreasonable for the Indiana Supreme Court to have held that the trial court in this case

complied with the requirements of *Simmons* when the jury was told that "life without the possibility of parole" was a sentencing option.

G.

The petitioner presents several arguments related to the penalty and sentencing phase of his trial.

> Counsel's failure to investigate the abuse, brutality, and humiliation of Mr. Stevens' childhood undermined the penalty phase mitigation presentation.

Petition at 64, docket # 18.

> The untapped mitigation evidence that counsel failed to present during the penalty phase of trial prejudiced Mr. Stevens.

Petition at 68, docket # 18.

> Counsel rendered ineffective assistance when, during the Penalty Phase arguments the Defense rejected any explanation for the offense.

Petition at 71, docket # 18.

> The sentencing phase of the trial was a replay of the ineffective and prejudicial penalty phase.

Petition at 72, docket # 18.

The Indiana Supreme Court addressed these claims in reviewing the denial of his post-conviction relief petition.

> The defendant contends that his trial counsel were deficient during the penalty phase and sentencing hearing by failing to present sufficient evidence of mitigating circumstances.

> The defense presented various witnesses and evidence showing various mitigating circumstances including his parents' divorce and his living in the homes of different people while growing up, the defendant's troubled childhood including suffering childhood sexual abuse, his adolescent alcohol and drug use and diagnoses of passive personality, his depression and suicide attempts, and his poor academic performance. The defendant's post-conviction counsel, however, assembled several witnesses to testify regarding information and theories that were not employed by defense trial counsel.

The defendant first argues that his trial lawyers unreasonably limited their penalty phase and sentencing presentations to events of his life that occurred before age 18 and that his counsel unreasonably relied upon Dr. Lennon, rather than presenting other psychological experts regarding the defendant's mental or emotional distress at the time of the killing. He argues that Dr. Lennon "was a fatal witness for the defense," noting that on cross-examination by the State, Dr. Lennon agreed with the State's theory that Zachary's murder appeared directly related to the defendant's fear of having to return to prison, and the defendant was not susceptible to traditional psychotherapy and was a serious danger to society. The defendant further urges that his trial counsel failed to present a reason for the defendant's crime. He argues that counsel should have presented expert evidence that, at the time of the killing, the defendant was under a mental disease or defect, with an impaired ability to appreciate the wrongfulness of his conduct and conform it to the law; that he was very likely influenced by the interactive use of drugs; that his disorders were treatable with medication

and intensive, individual psychotherapy; and that he would not constitute a pedophilia threat in prison.

The post-conviction court rejected these claims. The court observed that expert witness opinions suggesting that the defendant had an impaired ability to appreciate the wrongfulness of his conduct would have been strongly contradicted by the extensive evidence of the defendant's multiple attempts to kill Zachary and then carefully to take steps to cover-up the crime. The court noted that even one of the defendant's own experts at post-conviction acknowledged that the defendant could appreciate the wrongfulness of his conduct when he took steps to hide Zachary's body. The post-conviction court later concluded:

> Defense counsel were not ineffective for failing to investigate and prepare evidence of organic and mental impairments, including dissociative disorders, borderline personality disorders, and the effects of long-term drug use. Defense counsel's investigation of Petitioner's mental health and prior use of drugs was reasonable. Both of defendant's trial counsel testified that they were aware of Petitioner's prior drug abuse. Dr. Lennon was also aware of Petitioner's prior drug abuse. However, Petitioner denied having recently used drugs: he "used to do drugs, used to drink," but that he stopped drinking when he got arrested for child molesting, and "had stopped smoking marijuana awhile before that, long before that, pretty much cause my sister got killed by a guy that was high and ever since that I had, I had gone from doing it heavy to real light and then stopped." Moreover addiction counselor Needham evaluated Petitioner in January 1993 and found that Petitioner did not have a drug

or alcohol problem. Thus, defense counsel's investigation was reasonable.

Moreover, had defense counsel adopted the strategy of emphasizing Petitioner's prior drug use, this would have been inconsistent with their mitigation strategy of portraying Petitioner as the passive victim of abuse. As Dr. Lennon testified, so much of Petitioner's behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and then you look at all the drugs that he's been surrounded with his birth mother, and then the fact that she probably--even though she denies it, the evidence will suggest that she probably did do drugs or alcohol during pregnancy. Had defense counsel elicited evidence of Petitioner's prior use of illicit drugs, he would no longer appear to be a passive victim molded by outside forces, but would appear as someone who had actively decided to break the law. As the Seventh Circuit explained in *Stewart v. Gramley*, [w]hat is brought out during the penalty phase that will help a defendant is what goes to show that he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime. Defense counsel was not ineffective for failing to pursue a mitigation strategy that could have caused the jury to think that Petitioner had a more extensive history of lawbreaking than was otherwise apparent.

The post-conviction court thus found that defense counsel were aware of petitioner's past drug abuse and investigated the mental health issues through the use of Dr. Lennon. Further, the court found that presenting the petitioner's chronic drug abuse would cut against the defense strategy of portraying the petitioner as a passive victim of abuse rather than someone with an extensive history of lawbreaking. The court determined that the strategic decision to pursue this mitigation strategy over another was not ineffective assistance of counsel. We are not persuaded that the evidence in the record unavoidably points towards an opposite result.

> The defendant also contends that defense counsel was constitutionally ineffective because of a statement made by counsel during the penalty phase closing argument: "I am not going to tell you that anything that happened in Chris Stevens's life explains or excuses the events of July 15th, 1993. It doesn't, and he will have to suffer the punishment for that." The State responds that this statement was reasonable because it reminded the jury that recommending a sentence other than death would not mean that they were excusing the defendant for his actions, and would not mean that the defendant would escape with no punishment.
>
> The challenged statement was in the context of surrounding argument urging that the important part of the case before the jury was not whether the defendant committed the crime, but rather what penalty to recommend: a term of years, life imprisonment without parole, or death--any of which constitute severe punishment. Counsel's argument clearly emphasized the importance of mitigating

> circumstances. The challenged statement taken in context cannot reasonably be understood to have invited the jury to disregard mitigating circumstances. We decline to find deficient performance based on his claims of failure to present sufficient mitigating evidence during the penalty phase and sentencing.

Stevens v. State, 770 N.E. 2d 739, 753-55 (Ind. 2002) (citations, ellipsis, brackets, and quotation marks omitted).

The Indiana Supreme Court extensively reviewed these claims and it was not an unreasonable application of *Strickland* for the Indiana Supreme Court to hold that trial counsel's investigation of mitigating evidence and comments during the penalty phase of trial were within the range of professionally competent assistance.

H.

20

The petitioner argues that, "the attorney's dislike of their client created a conflict of interest that adversely affected Mr. Stevens." Petition at 74, docket # 18. The Indiana Supreme Court, in reviewing the denial of his post-conviction relief conviction, found that this argument was procedurally defaulted.

> The defendant contends that his two trial counsel disliked him and that their personal animosity toward him interfered with their duty of loyalty to their client, adversely affecting their representation of him, to his prejudice. This issue was not designated in the petition for post-conviction relief and thus may not be raised on appeal.

Stevens v. State, 770 N.E. 2d 739, 756 (Ind. 2002). The petitioner explains in his traverse that this is not really an independent claim, per se, but rather it is no more than an extension and reiteration of defense counsel's hiring and utilization of Dr. Lennon and the resultant prejudice that enured to Mr. Stevens' as a result of defense counsels' [sic] the [sic] opening the door to the prior misconduct and future dangerousness. Traverse at 69, docket # 69. To the extent that this is an independent claim, it is procedurally defaulted. To the extent that this is an extension and reiteration of other arguments, it was inherently addressed by the Indiana Supreme Court and by this court in conjunction with those other arguments.

I.

In his traverse, the petitioner withdrew several of his claims related to ineffective assistance of counsel. The following ineffective assistance of counsel subclaims, which were originally parts of Mr. Stevens' Third Claim for Relief in his Petition, are hereby withdrawn as free standing, independent claims: (1) failure to adequately address the voluntariness of Mr. Stevens' confession; (2) the failure to object to victim impact evidence during the guilt phase; (3) the failure to present guilt phase witnesses; (4) IAC resulting in Mr. Stevens' loss of the right to testify.

Traverse at 85, docket # 69. Therefore those claims need not be further addressed in this memorandum.

J.

The petitioner argues that, "counsel failed to request a second change of venue". Petition at 82, docket # 18. The Indiana Supreme Court addressed this argument in the appeal from the denial of his post-conviction relief petition.

> The defendant contends that he was prejudiced by his counsel's deficient

> performance when they failed to seek a second change of venue. Upon motion of defense counsel, the case was removed from Putnam County, where the crime was committed, and venued to Tippecanoe County, two counties north of Putnam County. The defendant now argues that both counties are within the Indianapolis media market, that his counsel had no strategic reason to keep the case in Tippecanoe County, and that the failure to seek a second change of venue prejudiced him by denying him his right to a trial by an impartial jury.
>
> The post-conviction court found that defense counsel were not ineffective for failing to make a second motion for a change of venue due to pretrial publicity. The court found that, given the inherent newsworthiness of the case, media coverage would have been prevalent anywhere and although the coverage was at times extensive it was not necessarily on the front page as it would have been in Putnam County. The court also found that Stevens failed to demonstrate prejudice as the trial record showed that every panel of the venire was carefully questioned about pretrial publicity by the court, State, and defense counsel. The evidence does not compel a decision opposite that reached by the post-conviction court.

Stevens v. State, 770 N.E. 2d 739, 750-51 (Ind. 2002) (footnote omitted). The petitioner's arguments demonstrate, at most, that jury selection was difficult and time consuming, not impossible, as a result of the pre-trial publicity in Tippecanoe County. The petitioner argues that

there were numerous prospective jurors who had been exposed to media reports about the case. To the extent that jurors with media exposure were seated on the jury, that is a jury selection question, not a question of venue. It was not unreasonable for the Indiana Supreme Court to have found that the petitioner was neither prejudiced by nor denied the effective assistance of counsel because they did not seek a second change of venue.

K.

The petitioner argues that, "the juror questionnaire provided no useful guidance" (petition at 84, docket # 18) and that there was ineffective assistance of counsel "during voir dire" (petition at 85, docket # 18). The Indiana Supreme Court addressed these arguments in reviewing the denial of his post-conviction relief petition.

> The defendant challenges his trial counsel's performance in jury selection and particularly as to the jury questionnaires submitted to prospective jurors.
>
> He argues that his trial counsel used questionnaires that failed to address mitigation issues or to explain the meaning of "life without parole," and thus failed to ensure that prospective jurors understood they could address future dangerousness with this sentencing option. We first note that the questionnaire form was not generated by counsel but prepared by the trial court and submitted to counsel for review. Jury questionnaires are a useful tool employed by courts to facilitate and expedite sound jury selection. Their proper purpose is not to condition or indoctrinate prospective jurors with the parties' contentions, notwithstanding

attempts of some counsel to the contrary. Ineffective assistance of counsel may not be based upon an alleged failure of counsel to thus misuse jury questionnaires.

The defendant further alleges that his counsel were deficient in jury selection by failing to integrate their mitigation theory into the voir dire process, and to exhaust peremptory challenges. We have held that it is permissible to use voir dire to inquire into jurors' biases or tendencies to believe or disbelieve certain things about the particular line of defense. The record reveals that defense counsel's voir dire questions extensively inquired regarding the jurors' openness to considering mitigating factors to prevent the imposition of the death penalty. We decline, however, to find a criminal defense attorney's performance to be deficient for failing to condition jurors as to the particular mitigation evidence anticipated in an individual case.

The post-conviction court found that trial counsel were not ineffective for failing to exhaust their peremptory challenges. The court noted that, between the two of them, the defendant's trial counsel had spent over fifty hours reviewing the completed jury questionnaires. They challenged nineteen jurors for cause, seventeen of which were granted. The court noted that they used seventeen of their twenty peremptory challenges, but for strategic reasons did not exhaust them because what was coming up was worse. The court also observed that counsel successfully rehabilitated several jurors that the

> State challenged for cause, forcing the State to exercise peremptory challenges. The evidence does not compel a decision opposite that reached by the post-conviction court.

Stevens v. State, 770 N.E. 2d 739, 751 (Ind. 2002) (quotation marks and citations omitted; emphasis in original).

Both the record, and petitioner's extensive review of it in his traverse, demonstrate that trial counsel knew a great deal about the jury pool. The purpose of the jury questionnaire and voir dire is to elicit information from prospective jurors so trial counsel may exercise peremptory and for cause challenges. While it is certainly possible that trial counsel could have done a better job with both the questionnaire and voir dire, their performance was not ineffective in that they ultimately obtained a great deal of valuable and insightful information about the prospective jurors.

The petitioner objects to the Indiana Supreme Court's characterization of his argument as a suggestion that the jury should be conditioned or indoctrinated with the questionnaire or during voir dire. Nevertheless, the focus of this argument is more on what should have been communicated to the jury pool with the questions than what should have been learned from it by their answers. Without regard to the questions during voir dire, both the record and petitioner's review of it make clear, that the prospective jurors answers provided a great deal of information to trial counsel. Because trial counsel obtained an adequate quantity and detail of information about these jurors, they were not ineffective for not having asked better questions and the Indiana Supreme Court was not unreasonable in finding that trial counsel was not ineffective during jury selection.

The petitioner argues that,

Due to the appellate ramifications attendant to failure to exhaust, reasonably competent counsel would have factored in their belief that their client would be convicted and the case likely to appeal. Petition at 89, docket # 18. This is a very odd argument. If the petitioner believed that one or more jurors were seated which should have been excused for cause, then he could have argued that his trial counsel were ineffective for not challenging that juror and for not preserving that err for appellate review, but that is not the argument that was presented to the post-conviction court and that is not the argument that is presented here, even though the traverse states that trial counsel did not challenge three of the seated jurors for cause. Because the question of whether any of the jurors should have been excused for cause was not presented to the post-conviction court and because it was not included in the petition, this court will not further address it.

This leaves solely the question of whether counsel was ineffective for not exhausting their peremptory challenges. Exhaustion, without a surviving challenge to a seated juror, does not create an issue for appellate review. That is to say, the argument "I exhausted all of my peremptory challenges" is not, standing alone, a legitimate basis for appeal. The state court addressed this argument by finding that the failure to exhaust was reasonable for strategic reasons because the remaining jurors were worse. The Indiana Supreme Court was not unreasonable in holding that trial counsel was not ineffective.

L.

The petitioner argues that trial counsel was ineffective because they "failed to object to the sheriff's decision to force Mr. Stevens to wear a stun belt . . .." Petition at 96, docket # 18. The Indiana Supreme Court addressed this

argument during its review of the denial of his post-conviction relief petition.

> The post-conviction court concluded that defense counsel were not ineffective for failing to raise this claim, noting that no evidence was presented that the defendant was impeded in his ability to assist his counsel, that no jurors were aware that Stevens was wearing a stun belt, and that the belt did not affect Stevens's appearance before the jury.
>
> The defendant asserts that while none of the jurors were aware that he was wearing a stun belt, their perception of him was still affected by the fact that he was under restraint. The defendant argues that he was harmed because wearing the belt made him appear to the jurors as emotionally withdrawn, subdued, and unusually silent, which may have influenced them to recommend the death penalty. In the post-conviction proceedings, the defendant presented the testimony of Dr. Robert Kaplan who testified that the wearing of the stun belt at trial would have inhibited the defendant's expression of emotion.
>
> The testimony of five of his capital trial jurors and the affidavit of a sixth juror were also presented. The jurors described the defendant as emotionally withdrawn, silent, and subdued. One juror stated that he did not appear remorseful. Three jurors stated that they observed the defendant interacting with his attorneys by passing notes and whispering. The defendant recognizes that his demeanor and affect as seen by the jurors during trial was

> essentially the same demeanor and affect they had seen during his videotaped confession.
>
> We conclude that the evidence does not unmistakably lead to a result contrary to the post-conviction court's factual findings. From the circumstances presented in this case, we find no reasonable possibility that but for the failure of trial counsel to object to the stun belt, the results of the guilt phase, penalty phase, or sentencing would have been different.

Stevens v. State, 770 N.E. 2d 739, 757 (Ind. 2002) (footnote and citations omitted). The petitioner notes that the Indiana Supreme Court does not cite any United States Supreme Court cases in deciding the stun belt issue, but there are no United States Supreme Court cases on stun belts. The petitioner cites *Illinois v. Allen*, 397 U.S. 337 (1970), *Holbrook v. Flynn*, 475 U.S. 560 (1986), *Riggins v. Nevada*, 504 U.S. 127 (1992), *Estelle v. Williams*, 425 U.S. 501 (1976), and *Sell v. United States*, 539 U.S. 166 (2003). The petitioner makes clear that these are cases involving shackling or medicating a criminal defendant at trial; they are not stun belt cases. These cases do not constitute clearly established law as to the question of stun belts. Though useful as analogies, the decision of the Indiana Supreme Court that trial counsel was not ineffective in failing to object to the stun belt was neither contrary to, nor an unreasonable application of, the clearly established law as determined by the United States Supreme Court.

IV. PENALTY PHASE AND SENTENCING ERRORS

The petitioner alleges that various errors occurred during the penalty and sentencing phases of his trial.

A.

The petitioner argues that there were penalty and sentencing phase errors because of "reliance upon invalid aggravating factors." Petition at 97, docket # 18. Specifically, the admission of evidence of "unsubstantiated prior acts of misconduct relating to the killing of one boy and the molestation of 25-30 others, as well as future dangerousness . . .." Petition at 98, docket # 18 (citations omitted). The Indiana Supreme Court addressed this issue on direct appeal.

> Stevens claims that his right to a reliable and proportionate sentence was violated when the State elicited testimony from defense expert Dr. Lawrence B. Lennon on cross-examination concerning Stevens' previous sexual molestation of an Indianapolis ten-year-old, his sexual molestations of approximately twenty-five to thirty other children, his alleged shooting and killing of another boy "out west," and Dr. Lennon's opinion regarding Stevens' future dangerousness. Stevens did not object to this line of questioning.
>
> Defense counsel may not have objected because it was so apparent that this testimony was relevant to countering the mitigating evidence which Stevens had up to that point placed before the jury. Stevens "opened the door" by eliciting testimony from various witnesses regarding his non-violent and law-abiding character. The obvious relevance of

> this evidence was its tendency to indicate that Stevens was not normally a violent or dangerous person, as if the murder of Zachary Snider had been a one-time, freak occurrence. The State may properly introduce rebuttal evidence tending to disprove mitigating circumstances shown by defendant's evidence. This issue is waived.

Stevens v. State, 691 N.E. 2d 412, 435 (Ind. 1997) (citations, footnote, and quotation marks omitted). The Indiana Supreme Court was not unreasonable in finding that this evidence was legitimately admitted as rebuttal evidence.

The petitioner also argues that the trial judge relied "upon invalid aggravating factors." Petition at 97, docket # 18.

> The judge's sentencing statements addresses and accords weight to factors of commission of the crime in a "calculated" manner, "coolly performed with deliberation," "cold-blooded manner," of a crime in a "sexual gratification", becoming "sexually excited after commission of the murder," each of which the court considered as aggravators and added weight to the death side of the scale, none of are among the listed aggravating factors in Indiana Code § 35-50-2-9, a number of which are actually synonymous with "intentional," which had already been found and weighed.

Petition at 105, docket # 18. The Indiana Supreme Court also addressed this issue on direct appeal.

> Third, Stevens claims that the trial court improperly considered non-statutory aggravators as part of its sentencing

determination in violation of *Bivins v. State*, 642 N.E. 2d 928, 955-56 (Ind.1994).

The sentencing statement begins by setting forth facts supporting the charged aggravators, finding each proven beyond a reasonable doubt. The statement then discusses the mitigating evidence and finds Stevens' troubled childhood and confession to be mitigating circumstances proven by a preponderance of the evidence. The statement then weighs the aggravating and mitigating circumstances and concludes not only that "the mitigating circumstances are far outweighed by the three aggravating circumstances," but that "the mitigating circumstances are outweighed by the [victim's age] alone." The statement then indicates the court's consideration of the jury's unanimous recommendation for death, placing "significant weight upon the jury's recommendation." The court then states, The Court having made a separate, independent assessment of the facts of this case, having balanced the aggravating circumstances and the mitigating circumstances, and having found that the mitigating circumstances are not outweighed by the aggravating circumstances, the Court now finds that the death penalty is the appropriate punishment for the defendant, Christopher M. Stevens, and for this crime.

Stevens specifically refers to the following, which concludes the court's sentencing statement: In addition to the evidence previously discussed, the Court finds this murder was calculated. It was motivated by self-preservation, coolly performed with

deliberation, and coupled with the defendant's sexual gratification. The defendant placed the possibility of his arrest for child molesting above the life of a ten year old boy. He stated that if placed in this position he would kill in order to avoid returning to jail. That is exactly what he did. He clearly acted in a cold-blooded manner. After his first attempt to suffocate Zachary was unsuccessful, he acted intentionally and deliberately a second and third time before successfully obtaining his goal of permanently silencing the child. Imposition of the death penalty in this case is proportionate to the nature of the offense and appropriate for the defendant, Christopher M. Stevens, and the death penalty is therefore imposed upon Christopher M. Stevens.

Even if the facts articulated in the judge's surplus statement indicate some influence on his decision, they appear mostly to be restatements of facts which would fall within the charged aggravating factors. Stevens himself states, Such terms as "calculated", "coolly performed with deliberation", and "cold-blooded manner" are no more than synonyms for the culpability element of the (b)(1) aggravator, "intentionally". Ind. Code § 35-50-2-9(b)(1). Likewise, the reference to "sexual gratification" as a reason for sentencing Stevens to death duplicates the underlying felony he found in this aggravator, child molesting.

The molestation and intentional murder of a ten-year-old child by one on probation, especially probation for a previous child molesting conviction, exemplifies a crime and

> criminal particularly worthy of the severest of penalties. While his confession and troubled childhood were mitigating circumstances properly found present, we agree with the trial court's determination that these weighed far less than the aggravating circumstances. After reviewing the sentencing process and facts supporting the trial court's decision, we determine that the death penalty is appropriate under the code and the constitutions and adequately reflects the nature of the offense and offender.

Stevens v. State, 691 N.E. 2d 412, 436-37 (Ind. 1997) (citations and subsequent history omitted). The trial judge did not apply invalid aggravating factors. After having made the requisite findings, he expressed a reasoned and factually supported personal opinion; nothing more. Indeed, the Indiana Supreme Court expressed the same opinion. Doing so was not error and the Indiana Supreme Court was eminently reasonable and correct in its ruling.

B.

The petitioner argues that,

> Because the charged aggravating circumstances were not proven beyond a reasonable doubt, the jury was not appropriately instructed with regard to matters related to the aggravators and the court double counted the (b)(1) and the (b)(11) aggravating circumstances, Mr. Stevens' penalty phase and sentence were unreliable.

Petition at 106, docket # 18. The Indiana Supreme Court addressed these three arguments on direct appeal. In addressing the argument that the aggravating

circumstances were not proven beyond a reasonable doubt, the court stated:

Stevens's death sentence was based, in part, on Zachary Snider being under the age of twelve when murdered. Stevens argues that this aggravator must be understood to require the defendant's actual knowledge of the child's age when he committed the murder, and that insufficient evidence existed to show that on July 15, 1993, he knew Zachary was under twelve.

While acknowledging that this question has never been presented to this Court, Stevens argues that our holding in *Castor v. State* should control. In *Castor* the evidence at trial showed that the defendant might have believed the plain-clothed officers who surrounded him in unmarked cars to be mafia "hit men" when he opened fire and killed one of them. The trial court had instructed the jury according to our previous decision in *Moore v. State* which stated that the (b)(6) aggravator applies if a defendant "knew or should have known" the victim was a law enforcement officer. Without specifically stating that it was overruling *Moore*, a bare majority of this Court determined that the aggravator required "actual knowledge" on the part of the defendant, rather the lesser "should have known" standard, and reversed and remanded for a new penalty phase trial and sentencing. The *Castor* majority said that the deterrence rationale underlying the aggravator justified the holding:

> The policy at the base of the exercise of the police power here is to create a special deterrence to the direction of physical force against those upon whom the security of the community depends.
>
> We believe that the societal rationale for imposing death for one who kills a law

> enforcement official is promoted only if the defendant knew that the victim was a law enforcement official at the time of the killing.

There was necessarily more than deterrence, however, supporting the *Castor* decision. The "knew or should have known" standard of *Moore* would deter more law enforcement officer murders because it would cause the hypothetical "rational murderer" to pause before killing someone who plausibly might be a law enforcement officer. The *Castor* "actual knowledge" standard, on the other hand, allows the "rational murderer" to err on the side of killing if he has any reason to question the status of his victim. Thus, rather than the articulated "deterrence" rationale, what appears to be the actual justification behind *Castor*'s holding is the notion of moral culpability. This follows because the holding makes sense only if one views a defendant who knowingly murders a police officer or other public servant as more deserving of harsher punishment than one who does not know his intended victim is a police officer. If such a mens rea makes the "cop-killer" more culpable, then logically the aggravator should not apply unless the defendant actually knew it was a police officer at whom he shot.

When one sees the retributive reality behind *Castor*'s "deterrence" language, the case before us is easily distinguished. Whereas a defendant may reduce his culpability by showing that he mistook a plain-clothed police officer victim for an average citizen, a defendant will never be able to reduce his culpability by claiming that he reasonably thought his eleven-year-old victim was actually twelve. The legislature has chosen an age-based bright line, rather than a more subjective standard such as "The victim was a young child," presumably to avoid both the vagueness and litigatory problems the less specific language would create. Such a decision was not

unreasonable, as twelve is a rational line of demarcation between pre-pubescence and adolescence. Because there is no moral culpability rationale for distinguishing between the murderer of an eleven-year-old child and the murderer of a twelve-year-old child, as there is between "law enforcement officer" and "civilian," the actual knowledge standard of *Castor* is unnecessary for cases involving the victim's age aggravator. Moreover, by applying the victim's age aggravator regardless of the defendant's awareness of his child-victim's age, such murders will be further deterred because their perpetrators will have to be absolutely certain that their victim is twelve or older, or suffer the consequences.

Accordingly, we hold that when the (b)(11) aggravator is charged, all the State need show beyond a reasonable doubt is what the code states: that the victim was less than twelve (12) years of age. Such a rule reflects the legislature's policies of both increased protection of young children and harsher punishment for those who prey upon them. As we stated in *Barger v. State*:

> For most of this century, the legislature has enacted and reaffirmed a consistent public policy aimed at punishing offenders more harshly when the offenders commit crimes against younger children. Younger children are more in need of protection; they are less likely to be able to defend themselves and are more susceptible to adult suggestion and schemes.

Stevens v. State, 691 N.E. 2d 412, 431-33 (Ind. 1997) (citations, footnote, quotation marks, brackets, ellipsis, and subsequent history omitted; emphasis in original). Though the Indiana Supreme Court also addressed the proof of other aggravating circumstances, the petition does not

appear to raise any of those other issues here. Nevertheless, the Indiana Supreme Court was not unreasonable in its resolution of all of the petitioner's arguments related to the adequacy of the proof of the aggravating circumstances.

> In addressing the argument that the jury was not appropriately instructed with regard to matters related to the aggravators, the court stated: Stevens's death sentence is based in part upon the finding that Stevens killed Zachary Snider while committing the crime of child molesting, Ind. Code Ann. § 35-50-2-9(b)(1)(C) (West Supp.1997). Stevens claims that his due process rights were violated because the jury was not instructed on the presumption of innocence and the requirements of proof beyond a reasonable doubt as to each essential element of the crime of child molesting. Therefore, Stevens argues, the trial court erred when such instructions were not given during the sentencing phase of his trial. Stevens did not make any objection to the instructions which were allegedly lacking, nor did he tender any of his own.

Such failures result in a waiver of the issue on appeal. *Stevens v. State*, 691 N.E. 2d 412, 431 (Ind. 1997) (quotation marks and citation omitted). Though procedurally defaulted, this argument is also substantively meritless. The petitioner's confessions support this aggravating circumstance and as previously discussed, uncorroborated testimony is not inherently unreliable.

In addressing the argument that the court double counted the (b)(1) and the (b)(11) aggravating

circumstances, the Indiana Supreme Court on direct appeal stated:

> Stevens claims that his right to a reliable and proportional sentencing determination was violated when the jury and court considered both the (b)(1)(C) (intentional killing while committing child molesting) and the (b)(11) (victim less than twelve years of age) aggravators as part of their sentencing determination. His argument arises from the fact that at the time of his sentencing hearing, the crime of child molesting was defined as performing or submitting to sexual intercourse or deviate sexual conduct with a child under twelve years of age. Because the (b)(11) aggravator was necessarily proven once the (b)(1)(C) aggravator was proven, Stevens claims that this overlapping impermissibly skewed the balance between aggravators and mitigators against him and undermined the reliability of the sentencing determination.
>
> Stevens cites several cases from other jurisdictions which allegedly support his position. The majority of these cases address death sentences predicated upon murder for pecuniary gain and murder during the course of robbery aggravating circumstances. The rationale behind these cases is best summarized by *State v. Jenkins*, 473 N.E. 2d 264, 293-297 ([Ohio] 1984) (overlap of murder-to-avoid-apprehension aggravator with murder-while-in-the-course-of-aggravated-robbery aggravator, and the latter with murder-in-the-course-of-kidnaping aggravator), which found that overlapping aggravators unfairly increase the

likelihood of a death sentence by inflating the weighing process in favor of the prosecution.

Other jurisdictions have rejected this reasoning. In holding that the two aggravating factors should not be merged as one, the Supreme Court of North Carolina noted that the felony-murder aggravator and the pecuniary gain aggravators examine different aspects of the same crime, thus deserving separate consideration. The Wyoming Supreme Court noted, furthermore, that the rule of merger enunciated by the other cases is premised upon an assumption that the number of aggravating circumstances has some independent significance. In Wyoming, the analysis of the defendant's conduct is qualitative, and the jury is not permitted to base its determination upon the quantitative weighing of aggravating circumstances.

The analyses from North Carolina and Wyoming are persuasive. As in Oliver, the aggravating circumstances at issue here address different policies, even though the age of the victim is an overlapping factor in both. The felony-murder aggravator focuses on the defendant's character, finding highly culpable the fact that the mind of the accused has in the same criminal episode formulated and held the intent to kill and the intent to commit one of the enumerated felonies. The age of the victim aggravator, by contrast, focuses on the status of the victim, arising from the need to give heightened protection to younger children and to punish more severely those who harm them. As in Engberg, our death penalty statute

> involves the weighing, rather than the counting, of aggravating factors. Although Stevens' jurors were not instructed as clearly on this point as were the jurors in Engberg, they were told repeatedly that they could only recommend the death or life without parole if they found the mitigating circumstances, if any, "outweighed" (and not "outnumbered") by the aggravating circumstance(s) alleged.
>
> We find no reason to believe that the total aggravating weight given to Zachary's age by the jury would necessarily increase simply because it is mentioned in more than one factor. As the Wyoming Supreme Court said, The sentencing authorities' balancing of aggravating and mitigating circumstances which the Florida court previously had said is never a simple summing of aggravating circumstances, was not disturbed by the separate articulations of what is a single aspect although having separately identifiable characteristics.

Stevens v. State, 691 N.E. 2d 412, 433-34 (Ind. 1997) (footnotes, quotation marks, citations, parallel citations, and ellipsis omitted). As the petitioner repeatedly points out, Indiana is a weighing state and therefore the Indiana Supreme Court was not unreasonable in dismissing this inapplicable, counting-based argument.

C.

The petitioner argues that, "the jury was not instructed on standards for determining the appropriateness of death or life without parole." Petition at 108, docket # 18. The Indiana Supreme Court addressed this argument on direct appeal.

> In *Zant v. Stephens*, 462 U.S. 862, the Court said: A fair statement of the consensus expressed by the Court in Furman is that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

The respondent in that case argued that this mandate in Furman was violated by a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute. The Court dismissed this argument, however, because it could not be accepted without overruling the specific holding in Gregg. The Court stated:

> The approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the State Supreme Court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty.

Similarly, allowing an Indiana trial judge, once the class of death-eligible murderers is

> narrowed through the balancing of aggravating and mitigating circumstances, the authority to decide with a jury's advice between life without parole and death is not constitutionally impermissible. Assessing slightly different arguments, we reach the same conclusion today in *Wrinkles v. State*, 690 N.E. 2d 1156 (Ind.1997). This Court still automatically reviews the appropriateness of all death sentences. Moreover, our system, even with its life without parole amendment, still "rationally distinguish[es] between those individuals for whom death is an appropriate sanction and those for whom it is not," *Spaziano v. Florida*, 468 U.S. 447, 460 (1984), by using aggravating circumstances which "limit the class of offenders upon which the sentencer is authorized to impose the death penalty," *Sawyer v. Whitley*, 505 U.S. 333, 341-42 (1992). In order to arrive at a sentence of life without parole, the jury and court must find the existence beyond a reasonable doubt of at least one of the same statutorily prescribed aggravating circumstances as they must find for a sentence of death, and likewise must find the aggravating circumstance(s) outweigh the mitigating circumstances.

Thus, by definition, those who receive a sentence of life without parole are within the class of those eligible for death (i.e., for whom death would be "appropriate"), even if they receive a sentence different than death. It is this narrowing and channeling of the class of murderers which significantly reduces the risk that sentencing of murderers will be "wholly arbitrary and capricious," *Gregg*, 428 U.S. at 189. As the Court stated in Lowenfield, "[t]he use of

'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." 484 U.S. at 244.

Juries and courts could have many different reasons for choosing to sentence a death-eligible defendant to life without parole instead of death. One reason, of course, could be leniency. They could decide that because the aggravating circumstances outweigh the mitigating circumstances the murderer deserves something more than a term of years, but also find some aspect of his case that makes them view death as an unacceptable sentence. Along this same line, the life without parole option allows jurors an intermediate step over the chasm between death and the possibility that the murderer could once again be released into their community some time down the road, a step which presumably could only benefit, rather than hinder, the plight of the murderer who would rather spend his life in prison than die.

Another reason, at the opposite end of the spectrum, could be retribution. The jury and judge could decide that for a particular defendant, spending the rest of his life imprisoned would be more of a punishment than a quick and painless death.

> Just as "the absence of legislative or court-imposed standards to govern the jury in weighing the significance of [the aggravating circumstances]" did not make Georgia's death penalty scheme unconstitutional, *Zant*, 462 U.S. at 880, the absence of standards to govern the jury in deciding whether death-eligible defendants should, instead, receive life imprisonment does not make Indiana's death penalty scheme unconstitutional.

> Also, by giving the jury and sentencer the additional option of life without parole, the statute allows for the equally important considerations enunciated in *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny, which call for individualized consideration of the circumstances of the defendant, his background, and his crime as part of the sentencing determination. *Spaziano*, 468 U.S. at 460; *Zant*, 462 U.S. at 879. For reasons as numerous as there are defendants found death-eligible through the statute's balancing process, life without the possibility of parole may or may not be an alternative sentence bestsuited for each. By leaving the judge and jury to decide for a particular defendant, after finding death an appropriate sentence, whether death is the appropriate sentence, the statute walks the tightrope between the two quite incompatible sets of commands, of *Furman* and *Lockett*.

Stevens v. State, 691 N.E. 2d 412, 429-30 (Ind. 1997) (quotation marks, citations, parallel citations, footnote omitted; emphasis and brackets in original). The Indiana Supreme Court deeply reviewed and applied the clearly established law. Its interpretation of the law of the United States Supreme Court was not unreasonable.

D.

The petitioner argues that, "the court failed to consider mitigation evidence." Petition at 109, docket # 18. The Indiana Supreme Court addressed this argument on direct appeal.

> Second, Stevens claims that the court failed to consider adequately the mitigating evidence he presented. Stevens essentially claims that

> because the court's sentencing statement summarizes the evidence of his bad childhood and psychological problems and does not present both as detailed or as starkly as he thinks they deserve, the sentencer obviously underrepresented the weight of this evidence in its weighing process. In finding the defendant's troubled childhood to be a mitigating circumstance proven by a preponderance of the evidence, the court clearly considered Stevens' growing up in an unstable and abusive environment, his being placed in foster care at his mother's request, his father's molestation of his step-sister, his mother's incarceration for drug dealing, and Doctor Lennon's psychological evaluation of him in coming to its finding. While a failure to find at all the existence of mitigating circumstances clearly supported by the record may imply that they were improperly overlooked, the sentencing judge is not obligated to credit these factors in the same manner as would the defendant. If a sentencing judge need not ascribe the same weight to the proffered mitigating evidence as the defendant, it stands to reason that the sentencer also need not discuss such evidence in his sentencing statement in as great of detail as the defendant would prefer in order to prove he or she adequately considered it. We find no indication that the trial court improperly considered or improperly weighed the available mitigating evidence.

Stevens v. State, 691 N.E. 2d 412, 435-36 (Ind. 1997) (quotation marks, ellipsis, brackets, citations, footnotes omitted; emphasis in original). The sentencing court did

not fail to consider mitigating factors. As the Indiana Supreme Court reasonably states, the sentencing court considered and entered findings about the mitigating evidence; it was not required to detail nor weight the mitigating factors in the way the petitioner wanted.

V. PROSECUTORIAL MISCONDUCT

A.

The petitioner alleges that "prosecutorial misconduct committed during voir dire tainted Mr. Stevens' jury and permeated later phases of his trial." Petition at 113, docket # 18. The Indiana Supreme Court addressed these arguments on direct appeal. In response to the petitioner's claim that prosecutorial misconduct occurred when the prosecutor discussed the inadmissability of "victim impact" (petition at 114, docket # 18) evidence during voir dire, the court on direct review stated:

> Stevens also alleges that the prosecutor committed misconduct during voir dire by commenting on the existence of inadmissible evidence. After the prosecutor's discussion of aggravating circumstances with the third panel of prospective jurors, he explained that because of *Bivins v. State*, the State could only present evidence relevant to the statutorily prescribed aggravators, and thus any evidence of "victim impact" not relevant to those factors would not be introduced. In response to Stevens' objection, the court admonished the prospective jurors to consider only the evidence presented by the parties, not to speculate on the existence or nonexistence of evidence not presented by the parties, and to disregard

the prosecutor's remarks regarding victim impact evidence.

Regardless of whether the prosecution's comment on *Bivins* was improper, it could not be said to have placed Stevens in a position of "grave peril," as its probable persuasive effect on the jury's verdict and/or sentence is nil. First, the comment was innocuous, and the admonishment was more than adequate to cure any minute prejudice the comment could possibly have caused. Second, regardless of what was said by the parties, no reasonable juror could have sat through this trial without feeling great empathy for Zachary's parents, wondering how he or she would feel if his or her own ten-year-old child were sexually molested by a neighbor, brutally suffocated and strangled, and then dumped over a remote bridge to decompose beyond recognition. The prosecutor's brief, general statement in voir dire regarding *Bivins* and victim impact testimony would not have appreciably contributed to such thoughts by the jurors. In fact, as the State points out, Stevens' own counsel's comments were much more likely to stir juror empathy towards the Sniders. In his opening statement on sentencing, Stevens's lawyer said, The past three or four days have been about the tragic and horrible death of Zachary Snider. And I don't mean to in any way in whatever I say or do here to depreciate from that. The Sniders have suffered the most horrible loss you can imagine, the loss of a son. I feel for them. I know you do. We've seen it.

> Most, if not all, of you have children. There's no greater loss.

We are satisfied the prosecutor's comment on Bivins during voir dire did not affect the outcome of Stevens' trial.

Stevens v. State, 691 N.E. 2d 412, 421 (Ind. 1997) (footnotes, citations, and ellipsis omitted).

Though the continued applicability of the harmless error test for habeas corpus review enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)[7] has been called into question with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[8], Pub. L.

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[7] "The test . . . is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citations and quotation marks omitted).

[8] Before AEDPA, federal courts assessed, on habeas review, whether a constitutional error was harmless by applying the rule articulated by the Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under that formula, the federal habeas courts were to inquire, in the case of trial error, whether that error had substantial and injurious effect or influence in determining the jury's verdict. This standard was refined by the Court in *O'Neal v. McAninch*, 513 U.S. 432 (1995), which held that where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error, the petitioner must prevail.

It is unclear whether the holdings in *Brecht* and *O'Neal* have survived the passage of AEDPA. In *Nevers v. Killinger*, 169 F.3d 352 (6th Cir.1999), our colleagues in the Sixth Circuit held that the test set out by the Supreme Court in Kotteakos and explicitly reiterated in *Brecht* quite precisely captures Congress's intent as expressed in AEDPA and, therefore, continues to be applicable. The court reasoned that, under *Brecht*, it is the habeas petitioner's

104-132, 110 Stat. 1214, and though the question appears to remain unresolved, like the court in Anderson it is unnecessary for this court to resolve this question because under either test the prosecutor's comments were harmless error. It was not unreasonable for the Indiana Supreme Court to have found that the prosecutor's comments about excluded victim impact evidence were harmless error and that the admonishment of the trial court was adequate. Neither has the petitioner demonstrated actual prejudice.

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burden to demonstrate that the trial error resulted in actual prejudice. If the petitioner is able to make that showing, he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt--the Chapman standard--was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of Chapman. *Nevers* has been followed in the Sixth Circuit, although with a marked lack of enthusiasm. *See Maurino v. Johnson*, 210 F.3d 638, 644 (6th Cir.2000) (following *Nevers* because there has been no intervening Supreme Court decision invalidating that panel's decision). The Eighth Circuit, by contrast, has indicated, in dicta, skepticism about the continued vitality of *Brecht*. *See Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir.2000). We need not take sides on this disagreement. Even if we assume that *Brecht* articulates a more generous standard than AEDPA, we must conclude that, under that more generous standard, the error was harmless. *See Thomas v. Gibson*, 218 F.3d 1213, 1226 n. 12 (10th Cir.2000).

Anderson v. Cowen, 227 F.3d 893, 898 n.3 (7th Cir. 2000) (parallel citations, quotation marks, citations, ellipsis, and subsequent history omitted).

B.

In response to the petitioner's claim that uncharged "aggravating factors" (petition at 117, docket # 18) were presented to the jury[9], the Indiana Supreme Court stated:

> Stevens makes several claims about prosecutorial misconduct during voir dire. One allegation arises from the prosecutor's display and reading of the entire death penalty statute, including its list of aggravating circumstances, to each panel of prospective jurors. The record discloses that this occurred as the prosecutor explained the different steps through which the statute requires a capital trial to go, and then asked the prospective jurors if they understood the process and had any questions or problems with it. Stevens failed to object, however, thereby forfeiting appellate review of any alleged error arising from the prosecutor's actions.
>
> In his reply brief, Stevens responds to the State's claim of waiver by inviting this Court to consider the prosecutor's actions under the "fundamental error" doctrine. Even if we were to consider improper the reading, displaying, and explaining the death penalty statute to prospective jurors during voir dire, such actions could not be said to so prejudice the rights of a defendant as to make a fair trial impossible.

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[9] Though the traverse states that it is withdrawing the claims related to the "prosecution reading and displaying the entire death penalty statute during voire dire" (Traverse at 138, docket # 69), he nevertheless argues this issue later in the traverse, therefore the court addresses it.

> This is particularly true in Stevens' case, where the court informed the jury several times of the State's burden to prove the existence of at least one of the charged aggravating circumstances beyond a reasonable doubt, and the specific findings in the jury's recommendation indicate that only the charged aggravating factors were considered in the balancing process.

Stevens v. State, 691 N.E. 2d 412, 420 (Ind. 1997) (citations, footnote omitted). It was not unreasonable for the Indiana Supreme Court to have found that reading the statute to the jury was harmless error and that the instructions to the jury and its findings related to the aggravating factors were adequate. Neither has the petitioner demonstrated actual prejudice. The petitioner also argues that the introduction of Dr. Lennon's testimony and report constituted prosecutorial misconduct because of their discussion of uncharged aggravating factors. Dr. Lennon's testimony and report have been discussed several times in other parts of this memorandum. It is unnecessary to repeat those details here again; and, for the reasons previously explained, their introduction was not prosecutorial misconduct.

C.

The petitioner's claims that the prosecutor erroneously explained to the jury the determination of "mitigating factors and weighing process" (petition at 120, docket # 18) for determining mitigation. He also claims that the prosecutor made "appeals to God, community, conscience and emotion" (petition at 121, docket # 18). While the respondent is undoubted correct that these arguments are procedurally defaulted, this court has long been loath to bottom its decisions solely on procedural grounds except where the law and the facts clearly require it. Here it is unnecessary to rest solely on procedural default because

these arguments are simply without merit. The petitioner notes that the prosecutor discussed with the jury mitigating factors and how to weigh them. While it is far from clear that these remarks were meaningfully erroneous, the simple fact remains that the court properly instructed the jury and there is no evidence that the jury failed to follow those instructions. Therefore any error which might have existed was cured and the petitioner did not suffer any actual prejudice thereby.

Without any case citations, the petitioner notes that the prosecutor made references to God, community, conscience and emotion. These passing religious references were merely colloquial hyperbole and did not result in actual prejudice. Additionally, the respondent is correct that the United States Supreme Court has "recognized that in a capital sentencing proceeding, the Government has a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." *Jones v. United States*, 527 U.S. 373, 382 (1999) (quotation marks omitted).

D.

The petitioner alleges that "throughout the trial the prosecution deliberately and repeatedly presented irrelevant and inadmissible evidence with the dual purposes of implying prior uncharged conduct and behavior in conformity therewith." Petition at 122, docket # 18. The Indiana Supreme Court addressed these arguments on direct appeal.

> Stevens argues that the trial court erred by allowing the State to admit testimony regarding Stevens' contact with Zachary during the two months before the murder. He points to testimony showing that Stevens had attended a Bible study class held in the yard of Alex

Krouse which Alex had also attended, that Stevens had attended and videotaped one of Zachary's Little League baseball games at which he offered five dollars to any boy who hit a home run, and that Stevens had taken Zachary fishing. Stevens claims this testimony was inadmissible under Indiana Rule of Evidence 404(b).

The Indiana Rules of Evidence provide that all relevant evidence is generally admissible. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The State's theory of the case was that Stevens killed Zachary to prevent him from disclosing Stevens's sexual molestations of Zachary. Thus, the circumstantial evidence at issue was relevant in that it allowed the jury to infer an ongoing relationship between the two, which corroborated the testimony of Mark Stevens and appellant's confession regarding motive.

Stevens' argument that Rule 404(b) proscribes admission of this testimony is misdirected, for Rule 404(b) does not apply to this evidence. Commonly known as a rule addressing uncharged misconduct, or prior bad acts has normally applied to evidence of a defendant's extrinsic activity which reflects adversely on his character. Videotaping a baseball game, attending a neighborhood Bible study, and taking a child fishing are not extrinsic activities which would, by themselves,

> indicate any unsavory character trait with which Stevens' could have acted in conformity on the day of Zachary's murder. Only after corroborating the direct evidence of motive contained in both Mark Stevens' testimony and the appellant's own confession does the challenged evidence take on a darker inference.
>
> Because this evidence does not fall within the ambit of 404(b), its admissibility is left to the balancing test of Rule 403. We conclude that this evidence tends to corroborate the testimony of Mark Stevens and appellant's own confession, and that any unfair prejudice that might accrue from it is slight.

Stevens v. State, 691 N.E. 2d 412, 422-23 (Ind. Ind. 1997) (footnotes, quotation marks, and citations omitted). The Indiana Supreme Court was not unreasonable in finding that this evidence was relevant and admissible. Therefore it could not be prosecutorial misconduct to admit it.

E.

The petitioner alleges that the prosecutor engaged in a "deliberate and malicious mischaracterization of law" in describing manslaughter. Petition at 125, docket # 18. Since no manslaughter instruction was given to the jury, this claim is moot.

F.

The petitioner alleges that the prosecutor "present[ed] . . . perjured testimony." Petition at 126, docket # 18. In a prior order in this case, this court faced the question of what promise, if any, was made to Tracey Eastin and whether he perjured himself.

The petitioner requests that this court expand the record to include two letters. The first letter was written by Tracy Eastin to Robert Lowe. Mr. Eastin was an inmate who testified during the penalty phase of the petitioner's trial. Mr. Lowe was the prosecutor. The second letter was written by Mr. Lowe to "To Whom It May Concern."

. . .

Mr. Eastin testified in response to questions from the prosecutor that he was not promised anything in return for his testimony. Mr. Eastin testified that he had requested a letter in support of a sentence modification, but that Mr. Lowe had refused to make such a promise. After he testified, Mr. Eastin wrote to Mr. Lowe and again requested a letter. This time he specifically mentioned that he wanted the letter in connection with the review of his security level within the Indiana Department of Correction (IDOC) because he had been confronted by other inmates in regard to his testimony. Seemingly in response, Mr. Lowe wrote a letter to "To Whom It May Concern". This letter specifically identified Mr. Eastin's IDOC number and housing assignment as well as making mention of the high level of publicity that the trial received. The letter's only request is that Mr. Eastin "be shown any consideration possible for" his testimony. Based solely on these two letters, petitioner argues that there is an inference that Mr. Lowe may have made a promise to Mr. Eastin to write a letter on his behalf, though counsel rightly concedes that these letters do not prove that any promise was made prior to Mr. Eastin's testimony. The petitioner argues that this is a showing of good cause for discovery to determine whether a promise was made.

An examination of the letters does not indicate that this was the type of letter that Mr. Eastin wanted when he requested assistance with a sentence modification. Mr.

Eastin appears to have originally wanted help to obtain an early release from prison, but what he appears to have gotten was help to obtain a safe housing assignment within the prison system so that he could be free from a possible assault from fellow inmates who were upset with his having testified against the petitioner. Though it is impossible not to call this a benefit, it is a benefit that Mr. Eastin could have obtained on his own merely by not testifying and thereby avoiding the wrath of other inmates. In this sense, Mr. Eastin gained no advantage from his testimony even though he did obtain a letter; that is to say, Mr. Eastin was no better off having testified and having received the letter than he would have been had he not testified. Though the letter could be used elsewhere because it is addressed to "To Whom It May Concern" and does not indicate to what address it was mailed, there is no indication or reasonable inference that this letter has been used anywhere other than within the Indiana prison system. There being no indication or inference that Mr. Eastin has benefitted from the letter, relative to his position prior to his testimony, there is no evidence that Mr. Lowe fulfilled the postulated promise. As such, any discovery related to whether there was a promise made to Mr. Eastin would be based on mere speculation.

Order of April 12, 2004 at 2 and 4-6, docket # 39. That order denied the motion to expand the record and the motion to conduct discovery. Without those letters in the record, there is no factual support for the argument that the prosecutor presented perjured testimony. Nevertheless, as the previous order made clear, even with those letters, there would be no substantive merit to the claim that the prosecutor proffered perjured testimony.

G.

In his traverse (docket # 69 at 138), the petitioner withdrew his claims related to "various acts of government interference". Petition at 130, docket # 18. Therefore those claims need not be further addressed in this memorandum.

VI. STUN BELT

The petitioner alleges that,

> In the absence of a showing of need and in violation of his rights to due process, trial without restraint, effective assistance of counsel and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth

[Amendments] to the United States Constitution, Mr. Stevens was forced to wear a concealed stun belt throughout his trial. Petition at 133, docket # 18. The ineffective assistance of counsel claim was addressed earlier in this memorandum. The Indiana Supreme Court, in its review of the denial of his post-conviction relief petition, found the independent claims to be procedurally defaulted.

> The defendant devotes a substantial section of his brief to his claim that the sheriff's decision to place a stun belt on the defendant during trial is reversible error. This Court has recently declared that stun belts may not be used on defendants in Indiana courtrooms. To the extent that the defendant asserts this issue as an independent claim, however, this issue is procedurally defaulted because it was not raised at trial or on direct appeal.

Stevens v. State, 770 N.E. 2d 739, 756-57 (Ind. 2002) (footnote and citations omitted). The Indiana Supreme

Court was correct that the petitioner was procedurally defaulted and did not have an independent stun belt claim. The petitioner asserts "[t]hat the Indiana Supreme Court chose not to address the issue, therefore, does not constitute an adequate and independent state law ruling supportive of procedural default." Traverse at 169, docket # 69. The Indiana Supreme Court did address this issue and it found that it was procedurally defaulted because it was not preserved for review. It is irrelevant that the post-conviction court addressed the merits of this claim in addition to finding that it was procedurally defaulted. Furthermore, the Indiana Supreme Court did address the merits of the stun belt claim, albeit under the rubric of the ineffective assistance of counsel claim.

Citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), the petitioner argues that, "[t]here was sufficient 'cause and prejudice' to forgive any procedural default . . . [because] [t]he failure of counsel to object to errors of this magnitude constitute ineffective assistance of counsel." Traverse at 168, docket # 69. The petitioner's ineffective assistance of counsel claim based on the failure to object to the stun belt has already been denied. Therefore, "cause and prejudice" does not exist to revive the independent stun belt claim.

The respondent asserts that this claim is procedurally defaulted, but the petitioner argues that the respondent waived the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) as provided for in subpart (b)(3) when he wrote: In addition, Respondent notes that Petitioner has sought both direct review and state post-conviction review of his conviction and sentence. Accordingly, Respondent believes that Petitioner has effectively exhausted his state court remedies as no further meaningful avenues of relief in state courts remain with respect to the claims asserted in this petition. Return at 2, docket # 42. This is not a waiver

and the respondent clearly did not intend it to be one since he asserted this defense in his memorandum in support of his return. 28 U.S.C. § 2254(b)(3) provides that A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement. (emphasis added). The quoted passage from the respondent's return is not an express waiver, it is a general statement about the procedural posture of the case and it accurately concludes that the petitioner no longer has any opportunity to overturn his death sentence in the state courts of Indiana. That is to say, the respondent agreed that the filing of a habeas corpus petition was generally timely and proper because it was not barred by the omission of any post-conviction filing and appeal. It was not an express waiver of this specific claim.

VII. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The petitioner argues that "Mr. Stevens was denied effective assistance of counsel on direct appeal in violation of the Sixth and Fourteenth Amendments to the United States Supreme Court [sic]." Petition at 138, docket # 18. In his traverse, he states, "that the subclaims pertaining to victim impact and unspecified instances of governmental interference . . . have been withdrawn." Traverse at 188, docket # 69. Nevertheless, he includes victim impact as one of the three subclaims he briefs on this issue in his traverse. Therefore this court will address it along with the other two remaining subclaims.

A.

The petitioner argues that his appellate counsel were ineffective for not questioning the reliability of his death sentence pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Indiana Supreme Court addressed this argument in reviewing the denial of his post-conviction relief petition.

> The defendant also claims ineffective assistance of appellate counsel alleging that his appellate counsel failed to argue that his sentence was unreliable due to a reduction in the jury's sense of personal responsibility because prospective jurors were repeatedly reminded that they were only recommending a sentence and two jurors were exposed to a prospective juror's comments that she could rationalize rendering a verdict on the ground that the judge would be making the final decision. The post-conviction court found that no evidence was produced at trial or on post-conviction that the jury's sense of personal responsibility was reduced, and that petitioner did not demonstrate that this issue was of greater merit than the issues actually raised on appeal.
>
> The jury selection process lasted five days. The defendant does not cite the record or otherwise direct our attention to the instances in which he claims that prospective jurors were repeatedly reminded that they were only recommending a sentence. As to his allegation that two jurors overheard another prospective juror's comment, there was no objection by trial counsel, nor did trial counsel challenge to remove the two jurors who overheard the comment.

> As noted above, with respect to the defendant's challenge to his appellate counsel's strategic decision to include or exclude this issue, we should be particularly deferential unless such a decision was unquestionably unreasonable. The defendant has failed to demonstrate that his appellate counsel's decision to omit this issue was unreasonable. The defendant has likewise not shown a reasonable probability that the outcome of the direct appeal would have been different if the issue had been presented. We agree with the decision of the post-conviction court to deny relief as to the defendant's claim of ineffective assistance of appellate counsel.

Stevens v. State, 770 N.E. 2d 739, 760-61 (Ind. 2002) (quotation marks, brackets, and citations omitted). Though the Indiana Supreme Court was not unreasonable in its denial of relief on this claim, the petitioner did not have a viable Caldwell claim even if his appellate counsel had raised the issue.

> Petitioner also maintains that the comments violated the requirement of reliability in the sentencing process articulated in *Caldwell v. Mississippi*. The principles of *Caldwell* are not applicable to this case. *Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments present an intolerable danger that the jury will in fact choose to minimize the importance of its role, a view that

> would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case.
>
> There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden v. Wainwright, 477 U.S. 168, 183, n.15 (1986) (citations, quotation marks, and brackets omitted).

Here the prosecutor's comments were made during voir dire in front of only a small number of the selected jurors; thus even more greatly reducing the chance that they had any effect on sentencing. Neither did the trial judge approve of the comments. Indeed the jury was instructed at least four times that the statements and arguments of counsel were not evidence and that their decision was to be based only on the evidence: during both the preliminary (trial record at 3644) and final instructions (trial record at 4403) for the guilt phase of trial and during both the preliminary (trial record at 4437-38) and final instructions (trial record at 5464) for the penalty phase of trial. Additionally, the jury was specifically instructed as to their role in the determination of the death penalty during both the preliminary (trial record at 4435) and final instructions (trial record at 5458-59) for the penalty phase

of the trial. Since the petitioner did not have a viable *Caldwell* claim, his appellate counsel were not ineffective for failing to raise this argument on appeal.

B.

The petitioner argues that his appellate counsel were ineffective because even though they raised the question of duplicate aggravating factors, they did not adequately explain nor stress that the failure to instruct Mr. Stevens' jury that the duplicate aggravating factors must be merged in order to avoid the weighing of unduly enhanced cumulative aggravating factors against the mitigating factors. .

Traverse at 196, docket # 69. The Indiana Supreme Court addressed this issue in its review of the denial of post-conviction relief.

> The defendant contends that if his appellate counsel would have better presented the issue of overlapping aggravators, there is a reasonable probability that he would have prevailed on appeal. The issue was presented and extensively addressed on direct appeal. The defendant does not persuade us that this issue presented or argued differently would have produced a different result.

Stevens v. State, 770 N.E. 2d 739, 760 (Ind. 2002) (quotation marks, brackets, and citations omitted). As the petitioner himself notes:

> Mr. Stevens' appellate counsel engaged in a lengthy discussion of the claim. Ex. C, Appellant's Brief at 99-103. The argument does address rulings in other states holding that duplicate aggravating factors should not be given separate and independent consideration in capital sentencing so as to avoid doubling

> the weight. Ex. C, Appellant's Brief at 102-03. None were federal law. The argument goes on to address Eighth Amendment concerns of reliability and proportionality. There is a reference to *Gregg v. Georgia*, 428 U.S. 153 (1976) in support of the proposition that "[t]he function of aggravation is to meaningfully narrow the class of persons for whom death is a possible punishment." Ex. C, Appellant's Brief at 104. Further *Sochor v. Florida*, 504 U.S. 527 (1992) is cited for the principle that the inclusion of an invalid aggravating circumstance in the weighing process creates the possibility of randomness, by placing a thumb on death's side of the scale.

Traverse at 195, docket # 69 (quotation marks, brackets, and parallel citations omitted). The petitioner argues that his appellate counsel could have done more. Nevertheless the Indiana Supreme Court clearly grasped and extensively addressed this argument on direct appeal.

X. Overlapping Aggravators

> Stevens claims that his right to a reliable and proportional sentencing determination was violated when the jury and court considered both the (b)(1)(C) (intentional killing while committing child molesting) and the (b)(11) (victim less than twelve years of age) aggravators as part of their sentencing determination. His argument arises from the fact that at the time of his sentencing hearing, the crime of child molesting was defined as performing or submitting to sexual intercourse or deviate sexual conduct with a child under twelve years of age. [FN23] Because the (b)(11)

aggravator was necessarily proven once the (b)(1)(C) aggravator was proven, Stevens claims that this overlapping impermissibly skewed the balance between aggravators and mitigators against him and undermined the reliability of the sentencing determination.

FN23. Ind. Code Ann. § 35-42-4-3 (West 1986) (age amended to fourteen by Act of Mar. 18, 1994, Pub. L. No. 79-1994, § 12, 1994 Ind. Acts 1097); (see also R. at 5470-71 (instruction to jury)).

Stevens cites several cases from other jurisdictions which allegedly support his position. The majority of these cases address death sentences predicated upon "murder for pecuniary gain" and "murder during the course of robbery" aggravating circumstances. E.g., *Cook v. State*, 369 So.2d 1251, 1256 (Ala.1979); *Provence v. State*, 337 So.2d 783, 786 (Fla.1976); *Willie v. State*, 585 So.2d 660, 680-81 (Miss.1991). The rationale behind these cases is best summarized by *State v. Jenkins*, 15 Ohio St.3d 164, 15 OBR 311, 473 N.E. 2d 264, 293-297 (1984) (overlap of murder-to-avoid-apprehension aggravator with murder-while-in-the-course-of-aggravated-robbery aggravator, and the latter with murder-in-the-course-of-kidnaping aggravator), which found that overlapping aggravators unfairly increase the likelihood of a death sentence by inflating the weighing process in favor of the prosecution. [FN24]

FN24. *See also Cook*, 369 So.2d at 1256 (dual application of robbery-murder and pecuniary gain aggravators "in effect

condemn[s] [the defendant] twice for the same culpable act--stealing money"); *People v. Bigelow*, 37 Cal.3d 731, 209 Cal. Rptr. 328, 340, 691 P.2d 994, 1006 (1984) ("[W]e believe the court should construe special circumstance provisions to minimize those cases in which multiple circumstances will apply to the same conduct, thereby reducing the risk that multiple findings on special circumstances will prejudice the defendant"); *Provence*, 337 So.2d at 786 (robbery-murder and pecuniary gain aggravators "refer to the same aspect of the defendant's crime," (emphasis in original), causing "one who commits a capital crime in the course of a robbery [to] always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged"); *Willie*, 585 So.2d at 680-81 (improper to not merge felony-murder (robbery) and pecuniary gain aggravators because, "[w]hen life is at stake, a jury cannot be allowed the opportunity to doubly weigh the commission of the underlying felony and the motive behind underlying felony as separate aggravators"); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, 874 (1977) ("We think it is not reasonable to construe the definitions [of aggravators] in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances").

Other jurisdictions have rejected this reasoning. In holding that the two aggravating factors should not be merged as one, the Supreme Court of North Carolina

noted that the felony-murder aggravator and the pecuniary gain aggravators examine different aspects of the same crime, thus deserving separate consideration. *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183, 204 (1981). The Wyoming Supreme Court noted, furthermore, that the rule of merger enunciated by the other cases "is premised upon an assumption that the number of aggravating circumstances has some independent significance." *Engberg v. State*, 686 P.2d 541, 553 (Wyo.1984). In Wyoming, "the analysis of the defendant's conduct is qualitative, and the jury is not permitted to base its determination upon the quantitative weighing of aggravating circumstances." *Id.*

The analyses from North Carolina and Wyoming are persuasive. As in *Oliver*, the aggravating circumstances at issue here address different policies, even though the age of the victim is an overlapping factor in both. The felony-murder aggravator focuses on the defendant's character, finding highly culpable "the fact that the mind of the accused has in the same criminal episode formulated and held the intent to kill and the intent to commit one of the enumerated felonies." *Lowery v. State*, 640 N.E. 2d 1031, 1044 (Ind.1994). *See also Woods v. State*, 547 N.E. 2d 772, 794 (Ind.1989) ("The substantially contemporaneous presence of the intent to kill and the intent to commit one of the serious enumerated felonies is the gravamen of [the (b)(1)] aggravating circumstance . . .."). The age of the victim aggravator, by contrast, focuses on the status of the victim, arising from the need to give heightened protection to younger children and to punish more severely those who harm them. *Barger v. State*, 587 N.E. 2d 1304, 1307 (Ind.1992). As in *Engberg*, our death penalty statute involves the weighing, rather than the counting, of aggravating factors. Although Stevens' jurors were not instructed as clearly on this point as were the jurors in *Engberg*, [FN25] they were told repeatedly that they could

only recommend the death or life without parole if they found the mitigating circumstances, if any, "outweighed" (and not "outnumbered") by the aggravating circumstance(s) alleged. R. at 5458-59, 5461, 5466-67.)

FN25. The trial court in *Engberg* instructed the jury: In making this determination you must use your reasoned judgment. You must weigh the mitigating circumstances against the aggravating circumstances and in doing so consider the following:

1. No numerical weight is assigned to any of the mitigating or aggravating circumstances.
2. The enumeration of the aggravating and mitigating circumstances does not indicate the weight to be given to any such circumstance.
3. One aggravating circumstance may be of such a nature as to outweigh one or more mitigating circumstance.
4. One mitigating circumstance may be of such a nature as to outweigh one or more aggravating circumstance.

Engberg, 686 P.2d at 553 (internal quotations omitted).

We find no reason to believe that the total aggravating weight given to Zachary's age by the jury would necessarily increase simply because it is mentioned in more than one factor. As the Wyoming Supreme Court said, "The sentencing authorities' balancing of aggravating and mitigating circumstances which the Florida court previously had said is

> never a 'simple summing of aggravating circumstances,' . . . was not disturbed by the separate articulations of what is a single aspect although having separately identifiable characteristics." *Engberg*, 686 P.2d at 553 (quoting *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), cert. denied sub. nom., *Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)).

Stevens v. State, 691 N.E. 2d 412, 433-34 (Ind. 1997) (emphasis, brackets, and ellipsis in original). The Indiana Supreme Court was not unreasonable in finding that it had extensively addressed the issue on direct appeal and that appellate counsel were not ineffective because the court would not have ruled differently even if the issue had been argued as proposed by post-conviction counsel.

C.

The petitioner argues that his appellate counsel were ineffective because they did not add a prosecutorial misconduct claim for showing the jury the victim's photograph five times. The Indiana Supreme Court addressed this claim.

> As to the defendant's assertion that his appellate counsel failed to adequately argue that the State improperly injected victim impact evidence by its use of a photograph of Zachary holding a fish, the designation of alleged ineffective appellate counsel in his petition for post-conviction relief does not identify any claim regarding victim impact evidence or mention the State's use of the photograph. The defendant's petition for post-conviction relief does claim that his appellate counsel was deficient in failing to adequately present a

> claim that the trial outcome was unfair and unreliable due to the injection of irrelevant and prejudicial evidence proscribed by Ind. Evidence Rule 404(b), but the argument in his appellate brief does not refer to any claimed violation of Rule 404(b). We deem this claim to be procedurally defaulted. Similarly, the defendant's claim that his appellate counsel failed to raise issues of governmental interference was not designated in his petition for post-conviction relief and is thus likewise not available. Furthermore, we have already discussed both of these claims in the context of the defendant's allegations of ineffective assistance of counsel at trial.

Stevens v. State, 770 N.E. 2d 739, 761 (Ind. 2002) (quotation marks, citations, and footnote omitted). Though, in his traverse, the petitioner withdrew his ineffective assistance of trial counsel subclaims related to "the failure to object to victim impact evidence during the guilt phase" (traverse at 85, docket # 69), those claims were nevertheless addressed by the Indiana Supreme Court in reviewing the denial of his post-conviction relief petition.

> The defendant argues that counsel were deficient in not objecting to victim impact evidence in the State's opening statement and during its case in chief. He first urges that his counsel should have objected to the following remarks during the State's opening statement: "Zachary Snider was a typical ten-year-old. He loved to fish, play ball, ride his bicycle, and he couldn't sit still for long . . . His parents, Todd and Sandi Snider, both worked to make ends meet." The defendant also challenges his trial counsel's failure to object to the State's use of a

> picture of Zachary Snider holding a fish. This picture was passed to the jury and was allegedly displayed by the prosecution on four other occasions during the guilt phase of the trial. Defense counsel never objected to the photograph and the defendant claims they were deficient for not objecting to this "prejudicial drumbeat of victim impact evidence."
>
> The post-conviction court found that defense counsel was not ineffective for failing to object to the introduction and use of the photograph. One of the defendant's defense attorneys testified during the post-conviction proceedings that, while he believed the use of the photograph was repetitive, he observed that it was sometimes prudent to not object so as to not draw the jury's attention to the evidence. A decision to not object to evidence when the objection may be more damaging than the evidence is within the wide range of professionally competent assistance. The trial court concluded, "Defense counsel's decision not to object to the admission of the victim impact evidence was a reasonable decision not to draw the jury's attention to this testimony." We agree. Because this represents reasonable trial strategy and because of the questionable merit of the allegedly omitted objections, the evidence does not compel a decision opposite that reached by the post-conviction court.

Stevens v. State, 770 N.E. 2d 739, 751-52 (Ind. 2002) (citations and brackets omitted). The Indiana Supreme Court was not unreasonable in finding that this ineffective assistance of appellate counsel claim was procedurally

defaulted. Neither was it unreasonable in finding that the related ineffective assistance of trial counsel claim was meritless.

VIII. UNCONSTITUTIONALITY OF THE INDIANA DEATH PENALTY STATUTE

The petitioner argues that,

> Indiana's death scheme, which is codified at I.C. § 35-50-2-9, is unconstitutional on its face and as applied and ensures the arbitrary and capricious imposition of the death penalty and denial of due process in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Petition at 140, docket # 18. He also argues that,

> The Indiana death penalty statute violates the Supremacy Clause and the Eighth Amendment of the United States Constitution and various international laws including, but not limited to, the Organization of American States treaty and the American Declaration of the Rights of and Duties of Man.

Petition at 152, docket # 18. The Indiana Supreme Court addressed these issues either in his direct appeal or in reviewing the denial of his post-conviction relief petition.

> Although acknowledging that we have previously decided to his detriment many of the arguments he advances, Stevens makes numerous challenges to Indiana's death penalty statute to preserve them should this Court reverse its earlier holdings and for federal review. For those claims previously addressed by this Court adversely to Stevens, [FN14] as Justice DeBruler said, "The court does not

choose to reassess its position at this time." *Daniels v. State*, 528 N.E. 2d 775, 783 (Ind. 1988).

FN14. *Harrison v. State*, 644 N.E. 2d 1243, 1258 (Ind. 1995) (prosecutorial discretion in seeking death penalty not unconstitutional); *Fleenor v. State*, 514 N.E. 2d 80, 90 (Ind. 1987) (death penalty does not violate Art. I, § 18, of the Indiana Constitution); *Lowery v. State*, 640

N.E. 2d 1031, 1043-44 (Ind. 1994) (jury as recommender rather than as sentencer does not violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985)); *Peterson v. State*, 674

N.E. 2d 528, 541 (Ind. 1996) (judicial override provision of death penalty statute does not deprive capital defendant of right to trial by jury); *Miller v. State*, 623

N.E. 2d 403, 410 (Ind. 1993) (statute does not require sentencer to consider irrelevant enumerated mitigating factors, nor does it ascribe too little weight to non-enumerated mitigating factors); *Bivins v. State*, 642 N.E. 2d 928, 947 (Ind. 1994) (qualifying language in enumerated death penalty mitigators does not preclude or restrict consideration of relevant mitigating circumstances under the "catch-all" mitigator); *see also Blystone v. Pennsylvania*, 494 U.S. 299, 304-05 (1990) (finding statutory scheme having enumerated aggravators with qualifying language, combined with "catch-all" mitigator, did not prevent jury from considering all relevant mitigating evidence); *Bivins*, 642

N.E. 2d at 945-46 (statute does not impermissibly shift burden of proving whether aggravation outweighs mitigation to defendant); *Moore v. State*, 479 N.E. 2d 1264, 1281 (Ind.) (1985) (statute not unconstitutional because it does not state that aggravators must be found to outweigh

mitigators beyond reasonable doubt); *Woods v. State*, 547 N.E. 2d 772, 794 (Ind. 1989) (incorporation of guilt phase evidence into penalty phase does not present risk of jury considering non-statutory aggravating circumstances as part of sentencing determination when trial judge properly instructs jury that it can only consider statutory aggravators); *Miller*, 623 N.E. 2d at 411 (statute not unconstitutional because it allows State to present the final closing argument in the penalty phase).

Citing *Lockhart v. McCree*, 476 U.S. 162 (1986), but without reference to any specific pages, Stevens claims that capital juries are more conviction-prone than non-capital juries; therefore, due process requires a prosecutor to submit the issue of capital qualification to a neutral fact-finder before proceeding to select a death-qualified jury. Not only does *Lockhart* fail to support this premise, [FN15] but it also refers to death-qualified juries as impartial, *see id.* at 175-76, 180, when reaching its conclusion that death-qualification of juries is constitutionally permissible. We fail to see how submission of a case to an impartial jury could offend notions of due process.

> FN15. Stevens' brief states, In *Lockhart v. McCree*, the United States Supreme Court recognized the validity of studies establishing that death qualification in fact produces juries somewhat more conviction-prone than non-death qualified juries. Counsel then builds two claims against Indiana's statute upon this premise. An honest approach would have supplied the full quote from *Lockhart*:
>
> > Having identified some of the more serious problems with McCree's studies regarding death-qualified juries being conviction-prone, however, we will

> assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that death qualification in fact produces juries somewhat more conviction prone than non-death-qualified juries. We hold, nonetheless, that the Constitution does not prohibit the States from death qualifying juries in capital cases.
>
> *Lockhart*, 476 U.S. at 173. Not only did the Supreme Court not recognize the validity of these studies (the quote clearly shows the Court merely saying that even if the studies were valid, their validity would not change the outcome of the case before it), but the four U.S. reporter pages preceding this quote contain detailed criticism of the fifteen social science studies introduced by McCree showing their insufficiency at proving that death-qualified juries are more conviction-prone. We do read the cases cited in appellate briefs and have low regard for patently false assertions regarding the precedent from which they are lifted. Ind. Professional Conduct Rule 3.3(a)(1) (A lawyer shall not knowingly make a false statement of law to a tribunal.)

Stevens claims the death penalty statute is unconstitutional because it does not specifically require the sentencer to ascribe some degree of weight to every piece of mitigating evidence offered by a capital defendant. While the statute does not specifically so state, it does require a sentencer, before imposing the death

> sentence, to find specifically that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind. Code Ann. § 35-50-2-9(k)(2) (West Supp. 1997). By necessity, therefore, the sentencer must ascribe some weight to the mitigating circumstances which actually exist in order to perform such a balance. A sentencer need not, however, ascribe the same weight to the mitigating evidence that the defendant does, nor must it give any weight to evidence which it believes irrelevant or false. *Widener v. State*, 659 N.E. 2d 529, 533-34 (Ind. 1995) (stating that the sentencing court is not obligated to find that mitigating circumstances exist at all, if in fact they do not). [FN16]
>
> FN16. Alternatively, one might say that by determining such evidence to be false, a sentencer has ascribed a weight to such evidence, a weight of "zero."

Stevens v. State, 691 N.E. 2d 412, 427-28 (Ind. 1997) (quotation marks, brackets, subsequent case history, parallel citations, ellipsis, and citations omitted) (emphasis in original).

> The defendant challenges the denial of his post-conviction claims that Indiana's lethal injection execution scheme violates international law, and that it contravenes evolving standards of decency, that it constitutes cruel and unusual punishment, and that his death sentence is unreliable.

> The first three of these claims were available but not presented on direct appeal and may not be asserted as post-conviction claims. *See Timberlake*, 753 N.E. 2d at 597. As to the defendant's claim that his death sentence is unreliable, he asserts that the jury and the judge were never provided information necessary to make an informed judgment as to the appropriate sentence. He argues that the jury was not informed about his mental disabilities and their interaction with his drug abuse and that the jury was not given a proper understanding of the sentence life without parole. We have considered these claims in the context of his assertions of ineffective assistance of counsel. We decline to consider sentence reliability as an independent freestanding post-conviction claim. *See Saylor v. State*, 765 N.E. 2d 535, 544 n. 1 (Ind. 2002); *Wrinkles*, 749 N.E. 2d at 1187 n. 3; *Allen v. State*, 749 N.E. 2d 1158, 1176 n. 28 (Ind. 2001).

Stevens v. State, 770 N.E. 2d 739, 761-62 (Ind. 2002) (quotation marks and citations omitted). The Indiana Supreme Court's determinations cannot be said to be unreasonable because the Indiana death penalty statute is not unconstitutional under any theory.

IX. POST-CONVICTION COURT'S ADOPTION OF PROPOSED FINDINGS

The petitioner argues that,

> The post-conviction court's wholesale adoption of the state's proposed findings and

> conclusions denied Stevens due process and a reliable adjudication of his post-conviction claims.

Petition at 157, docket # 18. The Indiana Supreme Court addressed this issue in its review of the denial of his post-conviction relief petition.

> The defendant claims that he was denied a full, fair and unbiased adjudication of his post-conviction claims when the postconviction court essentially adopted verbatim the proposed findings of fact and conclusions of law submitted by the State. In *Prowell v. State*, we acknowledged that a trial court's verbatim adoption of a party's proposed findings may have important practical advantages and we expressly declined to prohibit the practice. We noted, however, that the wholesale adoption of one party's findings results in an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court.
>
> The sixty-five pages of findings and conclusions entered by the post-conviction court are for the most part identical to the proposed findings submitted by the State, but we note several differences. For example, the post-conviction court added two sentences to one issue, a couple of paragraphs to another, and corrected some of the misspellings. It is thus evident that the court carefully considered and purposefully used of the individual findings proposed by the State. The extensive findings of fact and conclusions of law addressed all the claims delineated in his petition. While near verbatim reproductions may appropriately

> justify cautious appellate scrutiny, we decline to hold that the post-conviction court's utilization of the State's proposed findings in the present case constituted a failure to provide the defendant with a full, fair and unbiased adjudication of his post-conviction claims.

Stevens v. State, 770 N.E. 2d 739, 762 (Ind. 2002) (citations and quotation marks omitted). The petitioner argues that the United States Supreme Court "has long been critical of a court's verbatim adoption of findings of fact prepared by the prevailing party." Petition at 161, docket # 18. Nevertheless, "being critical" is far short of prohibiting the practice or finding a due process violation. "[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985). The Indiana Supreme Court was not unreasonable in determining that the near verbatim adoption of proposed findings did not result in a biased adjudication. Furthermore, the Indiana Supreme Court noted that such a situation justifies cautious appellate scrutiny, which they no doubt provided during their review of the denial of his post-conviction relief petition.

The petitioner cites several findings which he alleges are errors caused by adopting the State's proposed findings. Most embarrassingly, he notes that the post-conviction court found that he was guilty of three counts of murder even though there was but a single victim and a single conviction in this case. While such errors are grievously haunting and humiliating, the post-conviction court's other changes to the proposed findings belie the argument that it did not individually review his case. The recitation of the trial record preceding this lapse is accurate and demonstrates that this is but a lamentable example of the kind of word processing errors that occasionally occur

in busy law offices and courts. Furthermore, this clearly erroneous finding had no impact on the merits of the petitioner's claims.

The petitioner also cites other alleged errors in the findings of the post-conviction court, but those errors are of a different type and character. They are not evidence of inattention, but of disagreement. An appeal was, and is, the course of action when a party disagrees with the findings of a trial court. Here the petitioner took his appeal and the Indiana Supreme Court was not unreasonable in its review of the post-conviction court's ruling.

X. CONCLUSION

The petitioner, at various locations in his petition, argues that the cumulative effect of the alleged errors undermines the "reliability in the determination that death is the appropriate punishment . . .." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As discussed throughout this memorandum, this court has not found merit in any of the petitioner's individual arguments. So too, the cumulative effect of his arguments has done nothing to shake this court's substantial belief that death was and is the appropriate punishment in this case. As Chief Justice Shepard stated in the Indiana Supreme Court's opinion on direct appeal,

> The molestation and intentional murder of a ten-year-old child by one on probation, especially probation for a previous child molesting conviction, exemplifies a crime and criminal particularly worthy of the severest of penalties.

Stevens v. State, 691 N.E. 2d 412, 437 (Ind. 1997).

XI. ORDER

For the forgoing reasons, the Petition for a Writ of Habeas Corpus (docket # 18) is DENIED and the pro se letter requesting dismissal (docket # 71) is DENIED AS MOOT.

IT IS SO ORDERED.

Dated: January 13th, 2005

/s/ ALLEN SHARP
ALLEN SHARP, JUDGE
UNITED STATES
DISTRICT COURT

ATTORNEYS FOR APPELLANT
Susan K. Carpenter
Public Defender of Indiana

Thomas C. Hinesley
Deputy Public Defender

Barbara S. Blackman
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE
Karen Freeman Wilson
Attorney General of Indiana

Andrew L. Hedges
Deputy Attorney General
Indianapolis, Indiana

In The
INDIANA SUPREME COURT

CHRISTOPHER M. STEVENS,	)	
Appellant (Defendant Below),	)	
	)	
v.	)	No. 79S00-9804
STATE OF INDIANA,	)	-PD-00250
Appellee (Plaintiff Below).	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable George J. Heid, Judge
Cause No. 79D02-9402-CF-24

On Appeal from the Denial of Post-Conviction Relief

June 26, 2002

DICKSON, Justice

In 1995, Christopher M. Stevens was convicted of the 1993 murder of ten-year-old Zachary Snider. In accord with the jury's recommendation, the trial court ordered the death sentence. This Court affirmed the conviction and sentence on direct appeal. *Stevens v. State*, 691 N.E.2d 412 (Ind. 1997), *cert. denied,* 575 U.S. 1021, 119 S.Ct. 550, 142 L.Ed.2d 457 (1998). The defendant thereafter petitioned for post-conviction relief. After extensive proceedings and the presentation of evidence, the post-conviction court denied his petition. He now appeals from the denial of post-conviction relief. The factual details of the offense are detailed in our opinion on direct appeal. *Id.* at 416-420. We affirm the denial of post-conviction relief.

The defendant enumerates seven issues presented for review. We regroup them as follows: (1) ineffective assistance of trial counsel; (2) governmental interference with the right to counsel; (3) ineffective assistance of appellate counsel; (4) unreliability and unconstitutionality of the death sentence; (5) incomplete, unfair, and biased post-conviction relief adjudication.

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. *Langley v. State*, 256 Ind. 199, 203, 267 N.E.2d 538, 540 (1971). Post-conviction proceedings are civil proceedings, and a defendant must establish his claims by a preponderance of the evidence. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). Because the defendant is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). In

other words, the defendant must convince this Court that there is *no* way within the law that the court below could have reached the decision it did. *Spranger v. State*, 650 N.E.2d 1117, 1120 (Ind. 1995). We do not defer to the post-conviction court's legal conclusions, but do accept its factual findings unless they are "clearly erroneous." Ind.Trial Rule 52(A); *Conner v. State*, 711 N.E.2d 1238, 1245 (Ind. 1999); *State v. Van Cleave*, 674 N.E.2d 1293, 1295-96 (Ind. 1996), *reh'g granted in part*, 681 N.E.2d 181 (Ind. 1997). As we recently stated in *Timberlake*:

> Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. *Rouster v. State*, 705 N.E.2d 999, 1003 (Ind. 1999). Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. P-C.R. 1(1); *Rouster*, 705 N.E.2d at 1003. If an issue was known and available but not raised on direct appeal, it is waived. *Rouster*, 705 N.E.2d at 1003. If it was raised on appeal, but decided adversely, it is res judicata. *Id.* (citing *Lowery v. State*, 640 N.E.2d 1031, 1037 (Ind. 1994)). If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding. *Woods v. State*, 701 N.E.2d. 1208,1215, [1220] (Ind. 1998). A claim of ineffective assistance of appellate counsel is also an appropriate issue for post-conviction review. As a general rule, however, most freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and res judicata.

753 N.E.2d at 597-98. Furthermore, any "[i]ssues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal." *Allen v. State,* 749 N.E.2d 1158, 1171 (Ind. 2001)(citing Ind.Post-Conviction Rule 1(8)("All grounds for relief available to a petitioner under this rule must be raised in his original petition.")); *Howard v. State,* 467 N.E.2d 1, 2 (Ind. 1984)("It is well settled that issues which are not raised either at the trial level, on appeal, or in a post-conviction petition are waived.").

1. Ineffective Assistance of Trial Counsel

The defendant contends that deficiencies in his trial representation created a reasonable probability that the results of both the guilt phase and sentencing phase would have been different. In this appeal, he asserts numerous claims of alleged errors of trial counsel.

To succeed before the fact finder on his claim of ineffective assistance of counsel, the defendant needed to prove by a preponderance of the evidence not only that his trial counsel's representation fell below an objective standard of reasonableness, but also that his counsels' errors were so serious as to deprive him of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *See Bell v. Cone,* ___ U.S.___, 122 S.Ct. 1843, 1846, ___ L.Ed.2d ___ (2002); *Williams v. Taylor,* 529 U.S. 362, 390, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389, 416 (2000); *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Woods v. State,* 701 N.E.2d 1208, 1224 (Ind. 1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. In determining whether a defendant proves his claim of ineffective assistance of counsel, the

fact-finding court is guided by various important guidelines. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled deferential review. *Id.* at 689, 104 S.Ct. 2065, 80 L.Ed.2d at 694. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Perez v. State,* 748 N.E.2d 853, 854 (Ind. 2001); *Timberlake,* 753 N.E.2d at 603.

a. Inadequate Investigation

The defendant first asserts that his two attorneys at trial failed to conduct a reasonable investigation into the facts and the law of his case. He alleges that they failed to timely begin their investigation, to pursue indicated avenues of investigation, to determine necessary expert consultation, to adequately pursue funding for experts and investigation, and to competently hire and assess the one mental health expert they did hire. The defendant asserts that his trial counsel failed to develop a coherent theory of the case that was legally and factually supported and inherently consistent across the guilt and penalty phases. He maintains that, had his counsel conducted a reasonable investigation, they would have uncovered evidence of his mental illness and substance abuse relevant both to the guilt and penalty phases of his trial.

The post-conviction court concluded that defense counsel "adequately investigated the facts and law related

to the guilt phase of [the defendant's] trial," Record[1] at 710, and that counsel were "not ineffective for failing to timely seek and secure necessary and appropriate investigative and expert assistance during the trial." *Id.*

The defendant was represented at trial by two attorneys who were found to meet the heightened criteria of experience and training required for appointment in capital cases.[2] Trial Record at 59. They confronted a significant challenge. The defendant had admitted to a family member that he killed Zachary Snider and disclosed where he had concealed the body. After his arrest, the defendant admitted in a videotaped confession that he had repeatedly molested the ten-year old boy and then killed him, first attempting to do so by suffocating him with a pillow, then by strangling him with a cord, and finally by suffocating him by wrapping a trash bag over his head. This crime occurred while the defendant was on probation for a prior conviction of child molesting.

The defendant's trial attorneys sought and obtained funds to hire a mitigation investigator, fact investigator, paralegal, and psychologist, and all billings were ordered sealed. The mitigation investigator had served as a sentencing consultant and mitigation investigator for nine years prior to the defendant's trial and had completed the

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1 This opinion uses the designation "Record" to apply to the record of the post-conviction proceedings. The original trial record is designated as "Trial Record." "Supp. Record" refers to the supplemental record of the post-conviction proceedings.

2 Ind.Crim. Rule 24(B).

Indiana Public Defender Council's death penalty mitigation training course. The psychologist, Dr. Lawrence Lennon, examined Stevens and later testified for the defense during the penalty phase of the trial. Dr. Lennon had been recommended by the mitigation investigator. Other members of the criminal defense community also told Stevens's attorneys that Dr. Lennon had done a "very nice job" in testifying in another death penalty case. Dr. Lennon holds a Ph.D. in clinical Psychology from Miami University in Ohio. He was a psychology professor at St. Joseph's College, where he spent four years as the chair of the Psychology Department, and was clinical director of the Child and Adolescent Psychiatric Center at Humana Hospital in Indianapolis from 1991 to 1994. Dr. Lennon conducted a preliminary evaluation of the defendant prior to April 13, 1994 and met with him five times from June through December 1994. Dr. Lennon also met with the defendant's parents and siblings, and reviewed school records, records from the Hamilton Center, and arrest records. Other individuals from Dr. Lennon's office, including a social worker and another psychologist, participated in evaluations of the defendant. Defense counsel considered Dr. Lennon a good fit because of his expertise in treating children and adolescents, and the defendant's attorneys sought and received a transcript of Dr. Lennon's testimony in a case the attorneys felt had similar issues. The defendant's trial counsel sought discovery and filed multiple pretrial motions and supporting briefs, including motions to suppress, motions in limine, motions to dismiss, and a motion for change of venue.

The defendant claims, in part, that his counsel unreasonably delayed their investigation. Stevens was tried for murder in January 1995, within seventeen months of his arrest in July 1993. Defense counsel entered their

appearances in August 1993. In November 1993 counsel made their first request for funding for experts. This request was granted in May 1994 along with funds for an investigator.[3] Funding for mitigation investigation was secured in January 1994, and a mitigation specialist joined the defense. Defense counsel periodically requested additional amounts for the mitigation, fact, and expert witnesses. Such funding requests were approved. Billing records indicate that information was being gathered, procedural issues were being worked out with the prosecutor and the court, and research was being done on legal issues during the three months before the first funding request. Supp. Record at 25-29. Because of successful motions for continuance, Stevens was not tried until seven months after the time counsel added the psychologist and the fact investigator to their team of a paralegal and mitigation investigator. These facts do not compel a finding of deficient performance in the timing of trial counsel's investigation.

The defendant also asserts that his counsel unreasonably limited their investigation of the defendant's substance abuse and mental illness, foreclosing the development of a viable defense and mitigation strategy based on his mental disease and the effects of his substance abuse in favor of a defense unsupported by the law or the facts and a mitigation case that was of very low weight. He challenges the post-conviction court's finding that counsel were "not ineffective for failing to hire a toxicologist to offer expert testimony about Petitioner's use of drugs or alcohol." Record at 716. Similarly, the defendant also

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[3] Part of the reason for the delay was the determination of the defendant's request that the hearing be ex parte. See infra Part 2(b).

asserts that his counsel failed to adequately investigate his mental illnesses and investigate the possibility of mental disease or defect as a defense or mitigation. Specifically, he claims that his counsel "did not retain a consultant on mental health issues, seek a variety of expert mental health opinions, or even acquaint themselves with the forensic approach of the one expert they retained."[4] Br. of Petitioner-Appellant at 26.

During the guilt phase trial, the defense strategy was to urge that the killing was done in sudden heat and thus, if the defendant were guilty, he was guilty of voluntary manslaughter and not murder. At post-conviction, defense counsel testified that this was one of the alternative theories they had been considering from "day one," and when Stevens's confession was not suppressed, voluntary manslaughter became the theory of the case. Record at 2511-12. Counsel based this theory on a statement in the defendant's confession that he "snapped" or "went off." Record at 2512. Defense counsel tendered an instruction on voluntary manslaughter, which the trial court refused to give. During closing argument, defense counsel nevertheless asked the jury to return a verdict of voluntary manslaughter.

While the defendant argues in retrospect that a mental illness defense would have been more effective, his

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[4] The defendant also faults his trial counsel for providing a copy of Dr. Lennon's report to the State prior to trial. We note, however, that the report was provided in compliance with the trial court's order that "any reports from experts are to be submitted to the State sixty (60) days in advance of trial." Record at 299. On motion of the defense, the trial court extended the deadline for the exchange of reports from experts to July 19, 1994. Record at 343. The defense thereafter supplied the report.

proposed avenue was not without its pitfalls. The post-conviction court noted that, had defense counsel pursued this defense, they would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase. This evidence included testimony of a witness that, upon the defendant's prior release from jail onto probation for a previous conviction of child molesting, the defendant had declared that he planned to kill his next child molesting victim to avoid returning to jail. The trial court determined that defense counsel adequately investigated issues of substance abuse and mental illness and reasonably chose to pursue a different strategy.[5] The post-conviction court did not err in denying relief on this claim.

b. Deficient Preparation for and Performance at Trial

Enumerating numerous specific instances of claimed deficiencies, the defendant contends that his trial counsel

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[5] The post-conviction court concluded, in part:

> With the benefit of hindsight, Petitioner's present counsel suggest that trial counsel should have adopted the defense of mental disease or defect (Ind.Code § 35-41-3-6) and should have presented psychiatric evidence that Petitioner was unable to form the mens rea necessary to commit intentional murder. However, if Petitioner had raised the insanity defense, he would have opened the door to the admission of incriminating evidence that was not presented during the guilty [sic] phase of his trial. . . . Moreover, the facts of the crime itself militate against insanity. . . . Against this backdrop, Dr. Coons's testimony that, in his opinion, Petitioner's ability to appreciate the wrongfulness of his conduct was "impaired" would have had little or no effect on the jury's verdict, particularly in light of Dr. Coons's acknowledgement that Petitioner could appreciate the wrongfulness of his conduct when he took steps to hide Zachary's body.
>
> Record at 713-718.

provided constitutionally ineffective assistance in their preparation for and performance at the guilt, penalty, and sentencing phases of his trial.

(1) Voluntariness of Confession

The defendant argues that his lawyers failed to competently litigate the reliability and voluntariness of his confession to police. He asserts that his counsel could have argued that he "disassociated during the police interrogation" and exhibited other signs of mental illness that should have been raised in the motion to suppress and in asking the jury to find the confession unreliable.

One of the defendant's post-conviction witnesses, Dr. Phillip Coons, gave his opinion that there were at least two times when the defendant was dissociating during his confession. The post-conviction court acknowledged this testimony, but the court concluded that the defendant had presented no evidence of coercive police acts and therefore had not proven the predicate to finding a confession not voluntary. Record at 722. In our opinion on direct appeal, we rejected the defendant's claim that his confession was involuntary, noting:

> Finally, review of the videotape clearly indicates no elements of coercion. The entire interview lasted about an hour. Instead of showing overbearing officers soliciting short, "yes/no" responses from a broken, harassed, tired suspect, the tape shows non-threatening police officers asking general questions of Stevens, and then an alert responsive Stevens supplying long, detailed narrative.

Stevens, 691 N.E.2d at 424. To the extent that the defendant's post-conviction claim on this issue is not be

foreclosed by *res judicata*, it is governed by the principle that a defendant's claimed mental condition does not render a confession involuntary absent coercive police conduct. *See Connelly v. Colorado,* 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473, 484 (1986)(holding that even when defendant's mental condition is questioned, coercive police conduct is a predicate to finding a defendant's confession involuntary); *Pettiford v. State,* 619 N.E.2d 925, 928 (Ind. 1993)("Although a person's mental condition is relevant to the issue of susceptibility to police coercion, where the person voluntarily makes a confession without police coercion the confession may be considered in spite of the mental condition."). We find that there is no reasonable probability that the trial court would have suppressed the confession even had defense counsel presented all the evidence presented at the post-conviction proceedings, nor is it reasonably probable that the jury's assessment of the defendant's confession would have been affected by this testimony. The post-conviction court did not err in denying relief on this claim.

(2) Venue Change

The defendant contends that he was prejudiced by his counsel's deficient performance when they failed to seek a second change of venue. Upon motion of defense counsel, the case was removed from Putnam County, where the crime was committed, and venued to Tippecanoe County, two counties north of Putnam County. The defendant now argues that both counties are within the Indianapolis media market,[6] that his counsel had no strategic reason to

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[6] Although Tippecanoe and Putnam County residents may receive some overlapping Indianapolis media, the court found that Tippecanoe County has its own daily newspaper and television station.

keep the case in Tippecanoe County, and that the failure to seek a second change of venue prejudiced him by denying him his right to a trial by an impartial jury.

The post-conviction court found that defense counsel were not ineffective for failing to make a second motion for a change of venue due to pretrial publicity. The court found that, given the inherent newsworthiness of the case, media coverage would have been prevalent anywhere and although the coverage was at times extensive it was not necessarily on the front page as it would have been in Putnam County. The court also found that Stevens failed to demonstrate prejudice as the trial record showed that every panel of the venire was carefully questioned about pretrial publicity by the court, State, and defense counsel. The evidence does not compel a decision opposite that reached by the post-conviction court.

(3) Jury Questionnaire and Selection

The defendant challenges his trial counsel's performance in jury selection and particularly as to the jury questionnaires submitted to prospective jurors.

He argues that his trial counsel used questionnaires that failed to address mitigation issues or to explain the meaning of "life without parole," and thus failed to ensure "that prospective jurors understood they could address future dangerousness with this sentencing option." Br. of Petitioner-Appellant at 34. We first note that the questionnaire form was not generated by counsel but prepared by the trial court and submitted to counsel for review. Trial Record at 343. Jury questionnaires are a useful tool employed by courts to facilitate and expedite sound jury selection. Their proper purpose is not to condition or indoctrinate prospective jurors with the parties' contentions, notwithstanding attempts of some counsel to the contrary. Ineffective assistance of counsel

may not be based upon an alleged failure of counsel to thus misuse jury questionnaires.

The defendant further alleges that his counsel were deficient in jury selection by failing to "integrate their mitigation theory into the *voir dire* process," Br. of Petitioner-Appellant at 34, and to exhaust peremptory challenges. We have held that it is *permissible* to use *voir dire* to inquire into jurors' biases or tendencies to believe or disbelieve certain things about the particular line of defense. *Wisehart v. State,* 693 N.E.2d 23, 45-46 (Ind. 1998). The record reveals that defense counsel's *voir dire* questions extensively inquired regarding the jurors' openness to considering mitigating factors to prevent the imposition of the death penalty. We decline, however, to find a criminal defense attorney's performance to be deficient for failing to condition jurors as to the particular mitigation evidence anticipated in an individual case.

The post-conviction court found that trial counsel were not ineffective for failing to exhaust their peremptory challenges. The court noted that, between the two of them, the defendant's trial counsel had spent over fifty hours reviewing the completed jury questionnaires. They challenged nineteen jurors for cause, seventeen of which were granted. The court noted that they used seventeen of their twenty peremptory challenges, but for strategic reasons did not exhaust them because "what was coming up was worse." Record at 726. The court also observed that counsel successfully rehabilitated several jurors that the State challenged for cause, forcing the State to exercise peremptory challenges. The evidence does not compel a decision opposite that reached by the post-conviction court.

(4) Victim Impact Evidence

The defendant argues that counsel were deficient in not objecting to victim impact evidence in the State's opening

statement and during its case in chief. He first urges that his counsel should have objected to the following remarks during the State's opening statement: "Zachary Snider was a typical ten-year-old. He loved to fish, play ball, ride his bicycle, and he couldn't sit still for long . . . His parents, Todd and Sandi Snider, both worked to make ends meet." Trial Record at 3648. The defendant also challenges his trial counsel's failure to object to the State's use of a picture of the Zachary Snider holding a fish. This picture was passed to the jury and was allegedly displayed by the prosecution on four other occasions during the guilt phase of the trial. Defense counsel never objected to the photograph and the defendant claims they were deficient for not objecting to this "prejudicial drumbeat of victim impact evidence." Br. of Petitioner-Appellant at 38.

The post-conviction court found that defense counsel was not ineffective for failing to object to the introduction and use of the photograph. One of the defendant's defense attorneys testified during the post-conviction proceedings that, while he believed the use of the photograph was repetitive, he observed that it was sometimes prudent to not object so as to not draw the jury's attention to the evidence. A decision to not object to evidence when the objection may be more damaging than the evidence is within the wide range of professionally competent assistance. The trial court concluded, "Defense counsel's decision not to object to the admission of the [victim impact evidence] was a reasonable decision not to draw the jury's attention to this testimony." Record at 734. We agree. Because this represents reasonable trial strategy and because of the questionable merit of the allegedly omitted objections, the evidence does not compel a decision opposite that reached by the post-conviction court.

(5) Loss of Right to testify

As one of his enumerated examples of alleged ineffective assistance of counsel, the defendant contends that his trial counsel gave him incorrect advice, upon which he based his decision not to testify at trial. He argues that counsel's advice was based upon the presumption that the defendant's testimony could add nothing supportive of the defense's strategy to seek jury a instruction on voluntary manslaughter. The post-conviction court, however, found:

> On the contrary, defense counsel were concerned about having Petitioner testify because he was an [sic] chronic liar who would have been a bad witness. Moreover, if Petitioner had testified during the guilt phase, there is a danger that he would open the door to otherwise inadmissible evidence. Defense counsel's advice that Petitioner not testify was a reasonable strategic decision based on sound professional judgment.

Record at 724. We are not persuaded that the evidence compels a decision opposite that reached by the post-conviction court.

(6) Pursuing Voluntary Manslaughter as Defense Theory

The defendant claims that his trial counsel were ineffective for pursuing a "fundamentally flawed" approach to the case by proceeding on a theory of voluntary manslaughter. They tendered three proposed instructions that dealt with voluntary manslaughter, but these were rejected by the trial court. The defendant argues that there was no evidence in the record to support this theory, and that there was another viable defense available but not used.

The defendant urges that, if defense counsel had consulted other mental health experts, counsel "would have learned of [the defendant's] dissociative disorder, borderline personality disorder, chemical dependency, and LSD impairment at the time of the offense." Br. of Petitioner-Appellant at 42. In the post-conviction proceedings and in this appeal, the defendant's present counsel assert that the defendant was raped as a child; that at the time of the killing the defendant switched his identity with that of Zachary; that the defendant killed Zachary "because it's what he would have wanted in that molestation at age 10, to have been killed by his abuser;" and that the defendant's ability to appreciate the wrongfulness of his conduct "was disengaged when he was dissociating." *Id.* The defendant argues further that, even if the voluntary manslaughter defense were regarded as legitimate strategy, this would not excuse the failure to present the mental illness defense.

The post-conviction court found that counsel's decision to pursue the voluntary manslaughter strategy, while ultimately unsuccessful, did not amount to deficient performance. The court pointed out that "[a]ny appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter," *Roark v. State,* 573 N.E.2d 881, 882 (Ind. 1991), and that sudden heat is defined as provocation arising from a variety of emotions. In the defendant's admissions of guilt to his brother, the defendant said that he "clicked" or "went off" when Zachary threatened to tell his parents about the defendant's sexual conduct. In the defendant's confession to police, he stated that he killed Zachary because he was afraid that Zachary would report him. Concluding that the defendant received effective assistance of counsel as to their strategy to pursue voluntary manslaughter instructions, the post-conviction court found that the

defendant's trial attorneys "pursued the most viable defense available to them." Record at 664.

As to the failure to present a mental illness defense during the guilt phase, the post-conviction court noted that, had defense counsel done so, they would have opened the door to the admission of substantial incriminating evidence not otherwise presented during the guilt phase. *Cf. Miller v. Anderson,* 255 F.3d 455 (7th Cir. 2001). As we noted above, this included testimony that, upon the defendant's prior release from jail to probation for a previous conviction of child molesting, the defendant had declared his intent to kill his next child molesting victim to avoid returning to jail.

We conclude that the evidence as a whole does not lead unerringly and unmistakably to a decision opposite that reached by the post-conviction court, and we find that defense counsel's choice of defense theory did not constitute ineffective assistance of counsel.

(7) Defense guilt phase closing argument

The defendant contends that defense counsel were deficient in failing to present argument or tender an instruction regarding jury's authority under Art. 1, Sec. 19 of the Indiana Constitution to determine both the law and the facts. Stevens did not raise this issue in his petition for post-conviction relief. Issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal. *See* P-C.R. 1(8); *Allen,* 749 N.E.2d at 1171.

(8) Mitigation Evidence

The defendant contends that his trial counsel were deficient during the penalty phase and sentencing hearing by failing to present sufficient evidence of mitigating circumstances. The defense presented various witnesses and evidence showing various mitigating circumstances

including his parents' divorce and his living in the homes of different people while growing up, the defendant's troubled childhood including suffering childhood sexual abuse, his adolescent alcohol and drug use and diagnoses of passive personality, his depression and suicide attempts, and his poor academic performance. The defendant's post-conviction counsel, however, assembled several witnesses to testify regarding information and theories that were not employed by defense trial counsel.

The defendant first argues that his trial lawyers unreasonably limited their penalty phase and sentencing presentations to events of his life that occurred before age 18 and that his counsel unreasonably relied upon Dr. Lennon, rather than presenting other psychological experts regarding the defendant's mental or emotional distress at the time of the killing. He argues that Dr. Lennon "was a fatal witness for the defense," noting that on cross-examination by the State, Dr. Lennon agreed with the State's theory that Zachary's murder appeared directly related to the defendant's fear of having to return to prison, and the defendant was not susceptible to traditional psychotherapy and was a serious danger to society. Br. of Petitioner-Appellant at 45. The defendant further urges that his trial counsel failed to present a reason for the defendant's crime. He argues that counsel should have presented expert evidence that, at the time of the killing, the defendant was under a mental disease or defect, with an impaired ability to appreciate the wrongfulness of his conduct and conform it to the law; that he was very likely influenced by the interactive use of drugs; that his disorders were treatable with medication and intensive, individual psychotherapy; and that he would not constitute a pedophilia threat in prison.

The post-conviction court rejected these claims. The court observed that expert witness opinions suggesting that

the defendant had an impaired ability to appreciate the wrongfulness of his conduct would have been strongly contradicted by the extensive evidence of the defendant's multiple attempts to kill Zachary and then carefully to take steps to cover-up the crime. The court noted that even one of the defendant's own experts at post-conviction acknowledged that the defendant could appreciate the wrongfulness of his conduct when he took steps to hide Zachary's body. The post-conviction court later concluded:

> Defense counsel were not ineffective for failing to investigate and prepare evidence of organic and mental impairments, including dissociative disorders, borderline personality disorders, and the effects of long-term drug use. Defense counsel's investigation of Petitioner's mental health and prior use of drugs was reasonable, ... Both of [defendant's trial counsel] testified that they were aware of Petitioner's prior drug abuse. Dr. Lennon was also aware of Petitioner's prior drug abuse. However, Petitioner denied having recently used drugs: he "used to do drugs, used to drink," but that he stopped drinking when he got arrested for child molesting, and "had stopped smoking marijuana awhile before that, long before that, pretty much cause my sister got killed by a guy that was high and ever since that I had, I had gone from doing it heavy to real light and then stopped." Moreover addiction counselor Needham evaluated Petitioner in January 1993 and found that Petitioner did not have a drug or alcohol problem. Thus,

defense counsel's investigation was reasonable.

Moreover, had defense counsel adopted the strategy of emphasizing Petitioner's prior drug use, this would have been inconsistent with their mitigation strategy of portraying Petitioner as the passive victim of abuse. As Dr. Lennon testified, "so much of [Petitioner's] behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and then you look at all the drugs that he's been surrounded with his birth mother, and then the fact that she probably—even though she denies it, the evidence will suggest that she probably did do drugs or alcohol during pregnancy." Had defense counsel elicited evidence of Petitioner's prior use of illicit drugs, he would no longer appear to be a passive victim molded by outside forces, but would appear as someone who had actively decided to break the law. As the Seventh Circuit explained in *Stewart v. Gramley,* 74 F.3d 132, 136 (7th Cir. 1996), "What is brought out [during the penalty phase] that will help [a defendant] is what goes to show that he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime." Defense counsel was not

> ineffective for failing to pursue a mitigation strategy that could have caused the jury to think that Petitioner had a more extensive history of lawbreaking than was otherwise apparent.

Record at 675-76 (included citations to record omitted).

The post-conviction court thus found that defense counsel were aware of petitioner's past drug abuse and investigated the mental health issues through the use of Dr. Lennon. Further, the court found that presenting the petitioner's chronic drug abuse would cut against the defense strategy of portraying the petitioner as a passive victim of abuse rather than someone with an extensive history of lawbreaking. The court determined that the strategic decision to pursue this mitigation strategy over another was not ineffective assistance of counsel. We are not persuaded that the evidence in the record unavoidably points towards an opposite result.

The defendant also contends that defense counsel was constitutionally ineffective because of a statement made by counsel during the penalty phase closing argument: "I am not going to tell you that anything that happened in Chris Stevens's life explains or excuses the events of July 15th, 1993. It doesn't, and he will have to suffer the punishment for that." Trial Record at 5440. The State responds that this statement was reasonable because it reminded the jury that "recommending a sentence other than death would not mean that they were excusing [the defendant] for his actions, and would not mean that [the defendant] would escape with no punishment. Br. of Appellee at 37.

The challenged statement was in the context of surrounding argument urging that the important part of the case before the jury was not whether the defendant committed the crime, but rather what penalty to

recommend: a term of years, life imprisonment without parole, or death—any of which constitute severe punishment. Counsel's argument clearly emphasized the importance of mitigating circumstances. The challenged statement taken in context cannot reasonably be understood to have invited the jury to disregard mitigating circumstances. We decline to find deficient performance based on his claims of failure to present sufficient mitigating evidence during the penalty phase and sentencing.

(9) Life without Parole Instruction

The defendant contends that his trial counsel were deficient for failing to tender a penalty phase instruction that would have informed the jury of the "true effect" of life without parole. Br. of Petitioner-Appellant at 50. He argues that such an instruction was needed to offset the possibility that a juror might believe that if sentenced to life without parole, the defendant could be released early. The defendant argues that such an explanation should have been provided because there had been evidence on the issue of future dangerousness and because his trial counsel allegedly provided misguided speculation during jury selection when responding to a potential juror's question concerning the meaning of life without parole.[7]

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[7] During voir dire, defense counsel asked, "Mr. [Juror], anything about life without parole that you either think is a good idea or a bad idea in general?" Juror: "As an alternative to the death sentence you mean?" Defense counsel: "Yes." Juror: "Well, I'd have to get an idea of what you meant by life without parole. Is that truly life without ..." Defense counsel: "It means locked up. Yeah, that's what it means." Juror: "Even 20 years from now, the rules aren't going to change?" Defense counsel: "No. Well . . . [y]ou're the one that said you can't predict the future as to whether you change your views on the death penalty. I can't predict the future as to what the law is. Right now, the law is life

The post-conviction court's decision noted that it is unnecessary to instruct juries on words that are commonly understood. The court found that "'life without the possibility of parole' consists of common words that may be easily understood by persons of average understanding." Record at 733. It also found that had any such instruction been tendered it would have been refused. The post-conviction court concluded that the defendant had received effective assistance of counsel as to this claim. We agree and decline to find ineffective assistance of trial counsel on this issue.

(10) Conflict of Interest

The defendant contends that his two trial counsel disliked him and that their personal animosity toward him interfered with their duty of loyalty to their client, adversely affecting their representation of him, to his prejudice. This issue was not designated in the petition for post-conviction relief and thus may not be raised on appeal. *See* P-C.R. 1(8); *Allen,* 749 N.E.2d at 1171.

(11) Use of Stun Belt

The defendant devotes a substantial section of his brief to his claim that the sheriff's decision to place a stun belt[8]

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without parole is life without parole. . . . It means if a person is sentenced to life without parole, they don't walk out ever again." Record at 1825-27. Two jurors were seated from the panel who witnessed this interchange, though the juror directly involved in the discussion was excused.

[8] We recently described the nature and operation of the stun belt in *Wrinkles v. State*: The stun belt . . . is an electronic shocking device that is secured around the wearer's waist. Two nine-volt batteries connected to prongs that are attached to the wearer over the left kidney region power the belt. The belt may be activated from as far away as 300 feet, and once activated it delivers an eight-

on the defendant during trial is reversible error. This Court has recently declared that stun belts may not be used on defendants in Indiana courtrooms. *Wrinkles v. State,* 749 N.E.2d 1179, 1194 (Ind. 2001). To the extent that the defendant asserts this issue as an independent claim, however, this issue is procedurally defaulted because it was not raised at trial, *Williams v. State,* 690 N.E.2d 162, 166 (Ind. 1997), or on direct appeal, *Rouster v. State,* 705 N.E.2d 999, 1003 (Ind. 1999). But because the defendant's argument also claims that his trial counsel's failure to object to the stun belt at trial constitutes prejudicial deficient performance, we will address the issue in the context of ineffective assistance of trial counsel.

The post-conviction court concluded that defense counsel were not ineffective for failing to raise this claim, noting that no evidence was presented that the defendant was impeded in his ability to assist his counsel, that no jurors were aware that Stevens was wearing a stun belt, and that the belt did not affect Stevens's appearance before the jury.

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second, 50,000-volt shock that cannot be stopped. This high-pulsed electrical current travels through the body along blood channels and nerve pathways. The belt's electrical emission knocks down most of its victims, causing them to shake uncontrollably and remain incapacitated for up to forty-five minutes. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. Activation may cause some wearers to suffer heartbeat irregularities or seizures. Manufacturers of the stun belt emphasize that the belt relies on the continuous fear of what might happen if the belt is activated for its effectiveness.

749 N.E.2d 1179, 1193-94 (Ind. 2001)(internal citations omitted).

The defendant asserts that while none of the jurors were aware that he was wearing a stun belt, their perception of him was still affected by the fact that he was under restraint. The defendant argues that he was harmed because wearing the belt made him appear to the jurors as emotionally withdrawn, subdued, and unusually silent, which may have influenced them to recommend the death penalty. In the post-conviction proceedings, the defendant presented the testimony of Dr. Robert Kaplan who testified that the wearing of the stun belt at trial would have inhibited the defendant's expression of emotion.

The testimony of five of his capital trial jurors and the affidavit of a sixth juror were also presented. The jurors described the defendant as emotionally withdrawn, silent, and subdued. One juror stated that he did not appear remorseful. Three jurors stated that they observed the defendant interacting with his attorneys by passing notes and whispering. The defendant recognizes that his demeanor and affect as seen by the jurors during trial was essentially the same demeanor and affect they had seen during his videotaped confession. Br. of Petitioner-Appellant at 58.

We conclude that the evidence does not unmistakably lead to a result contrary to the post-conviction court's factual findings. From the circumstances presented in this case, we find no reasonable possibility that but for the failure of trial counsel to object to the stun belt, the results of the guilt phase, penalty phase, or sentencing would have been different.

2. Government Interference with Right to Counsel

The defendant contends that his trial counsel's preparation for and defense at trial was frustrated by various acts of governmental interference under circumstances that constructively denied him his right to

counsel, to present a defense, and to a fair and reliable trial. His claim focuses upon trial counsel's difficulties in obtaining unquestioned attorney fee payments, the denial of *ex parte* access by defense counsel to the court regarding funds for investigative assistance, and counsel's inability to obtain further mental health evaluations. While these claims were known and not raised in direct appeal, to the extent that they are in the nature of claims of ineffective assistance of counsel under the Sixth Amendment and require consideration of evidence outside the trial record, we will address them. The gravamen of his claim is that the court prevented his attorneys from adequately preparing for trial and securing expert assistance. In *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court recognized that when surrounding circumstances define a very small likelihood that any lawyer, even a fully competent one, could provide effective assistance, prejudice will be presumed without inquiry into the actual conduct of the trial. *Id.* at 659-60, 104 S.Ct. at 2047, 80 L.Ed.2d at 668. Only where there has been an actual breakdown of the adversarial process will a Sixth Amendment violation be found without inquiry into counsel performance. *Id.* at 657-58, 104 S.Ct. at 2046, 80 L.Ed.2d at 667.

(a) Fee Disputes

The defendant first alleges that Putnam County Circuit Judge LaViolette, who presided over the case until its venue was changed to Tippecanoe County, caused his attorneys "numerous difficulties in obtaining compensation" such that they "had to expend more time on collateral issues and attempting to have the assets or the resources to prepare for trial than [they had] in preparing for trial." Br. of Petitioner-Appellant at 61(citing Trial Record 733, 1413). The post-conviction court found that the billing procedures did not result in prejudice as neither

counsel indicated at the post-conviction hearing that the disputes "prevent[ed] them from taking any particular step or cause[d] them to forgo any particular part of their defense." Record at 730.

The post-conviction court concluded that the fee disputes did not materially affect counsel's performance. At the post-conviction hearing one defense counsel stated that he believed that at the initial stages of the case the dispute "impaired our ability to research and investigate the case," but he could not recall any particular thing he did not do because of the disputes. Record at 2067, 2088. The other attorney stated that the disputes took up time, but he could not specify any particular step he did not take because of the disputes. Record at 2556. The evidence as a whole does not lead us unerringly to a decision opposite that of the post-conviction court.

(b) *Ex Parte* Hearings for Funds

The defendant next alleges that judicial denial of his counsel's request for an *ex parte* hearing to determine funds for experts and investigation denied him a fundamental requirement to prepare and present a defense. He argues that the inability to obtain an *ex parte* hearing resulted in his attorneys (1) prematurely disclosing the identity of its consulting expert, (2) being unwilling to seek additional mental health experts or secure other evaluations, and (3) being hampered in their preparation for trial and choice of trial strategies.

The post-conviction court found that the "trial court did not deny defense counsel's requests for *ex parte* hearings, but merely informed counsel that they must show good cause before an *ex parte* hearing would be granted." Record at 745. The post-conviction court also determined that the order granting funds did not restrict counsel to any particular expert. *Id.* at 746. In addition, the

court found that the defendant did not identify any part of the trial record where funds were denied after the case was venued nor where defense counsel's "thought process and strategies were required to be disclosed prior to the approval of funds for expert witnesses." Record at 746.

The defendant urges that appointed capital case counsel should be entitled to an *ex parte* determination of all motions for funds for assistance. We decline this broad request. Communication between one litigant and the court, in the absence of the other parties, is strongly discouraged. *See* Ind.Professional Conduct Rule 3.5; Ind.Judicial Conduct Canon 3(B)(8). In *Newhart v. State,* 669 N.E.2d 953 (Ind. 1996), the defendant claimed that the trial court erred when it refused to grant him an *ex parte* hearing on his request for funds. We stated that "[o]ur ethical rules counsel against such *ex parte* communications," and concluded that the defendant had not persuaded us that the trial court erred in this regard. *Id.* at 955.

Courts in sister states have reached varying decisions on the right to an *ex parte* hearing. The Arizona Supreme Court in *State v. Apelt,* 861 P.2d 634, 649-50 (Ariz. 1993), determined that neither the Fourteenth Amendment's guarantee of due process nor that of equal protection entitles defendants to an *ex parte* hearing. Citing a similar judicial conduct canon as we did in Newhart, the Arizona court determined that *ex parte* communications are forbidden except where authorized by law, and as there were neither statutory nor organic law authorizing such a procedure the trial court did not err in refusing to conduct the hearing *ex parte*. *See also State v. Floody,* 481 N.W.2d 242, 256 (S.D. 1992)(no constitutional grounds for *ex parte* hearing); *Ramdass v. Commonwealth,* 437 S.E.2d 566, 570 (Va. 1993)(rejecting both federal and state constitutional arguments for an *ex parte* hearing), *rev'd on other grounds sub*

nom., 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In contrast, Louisiana has recognized a constitutional basis for allowing an *ex parte* proceeding, but requires a defendant to first demonstrate a particularized prejudice to the defendant from holding an adversarial hearing. *See State v. Touchet,* 642 So.2d 1213 (La. 1994). In *State v. Phipps,* 418 S.E.2d 178, 191 (N.C. 1992), North Carolina acknowledged that there are strong reasons to allow such proceedings to be held *ex parte*, but refused to find them to be constitutionally required and rather left the decision to trial court's discretion. Other states have decided that defendants are entitled to an unqualified *ex parte* hearing concluding that indigent defendants should not be required to reveal a defense theory or the identity of experts who are consulted but who may not testify at trial. *See Ex Parte Moody,* 684 So.2d 114, 120 (Ala. 1996)(holding criminal defendant entitled to *ex parte* hearing on whether expert assistance is necessary based on Fifth, Sixth, Fourteenth Amendments to Constitution); *Brooks v. State,* 385 S.E.2d 81, 84 (Ga. 1989) (deciding indigent defendant entitled to *ex parte* hearing to determine entitlement to public funds); *Arnold v. Higa,* 600 P.2d 1383, 1385 (Haw. 1979)(determining indigent defendant entitled to *ex parte* hearing so that he can demonstrate indigency or particularize reasons for request for litigation expenses without disclosing defensive theories to State); *McGregor v. State,* 733 P.2d 416 (Okla. Crim. App. 1987)(holding hearing to determine if defendant was entitled to court-appointed psychiatrist on motion must be *ex parte*); *State v. Barnett,* 909 S.W.2d 423, 429 (Tenn. 1995)(holding that when indigent defendant seeks psychiatric assistance, the hearing should be *ex parte*); *Williams v. State,* 958 S.W.2d 186, 193-94 (Tex. Crim. App. 1997)(deciding that an indigent defendant is allowed an *ex parte* proceeding because the defendant should not have to disclose

defensive theories to prosecution in order to obtain "basic tools of an adequate defense").

While we recognize that strategic considerations will often lead defense counsel to prefer secrecy as to their funding requests, we find no automatic constitutional entitlement to such *ex parte* proceedings. A trial court may, however, upon a showing of good cause, permit an *ex parte* request for funds for assistance. The denial of such a request is reviewable for abuse of discretion.

In the present case the defendant has not demonstrated that the actions of the trial court in requiring good cause before permitting an *ex parte* request resulted in an actual breakdown of the adversarial process. There is no Cronic violation here.

3. Ineffective Assistance of Appellate Counsel

The defendant also contends that he did not receive effective assistance of his appellate counsel. His brief focuses upon the claim that his appellate counsel inadequately presented the issue that Zachary's age was "double counted" as an aggravating circumstance because age was a factor in more than one of the aggravators. The defendant also mentions in cursory fashion three additional allegations of deficient appellate representation: (a) failing to argue that his sentence was unreliable due to a reduction in the jury's sense of personal responsibility; (b) failing to adequately argue that the State improperly injected victim impact evidence through its use of a photograph of Zachary holding a fish; and (c) failing to raise the issue of governmental interference.

A defendant is entitled to the effective assistance of appellate counsel. *Evitts v. Lucy,* 469 U.S. 387, 105 S.Ct. 830, 83, L.Ed.2d 825 (1985); *Johnson v. State,* 693 N.E.2d 941, 950 (Ind. 1998). Appellate ineffectiveness claims are

evaluated under the Strickland standard of conduct falling below professional norms and resulting in prejudice such that our confidence in the outcome is undermined. *Bieghler v. State,* 690 N.E.2d 188, 192-93. (Ind. 1997). As for challenges to an appellate counsel's strategic decision to include or exclude issues, courts should be particularly deferential "unless such a decision was unquestionably unreasonable." *Id.* at 194. To prevail on a claim of ineffective assistance of appellate counsel, a defendant must "show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." *Ben-Yisrayl v. State,* 738 N.E.2d 253, 261 (Ind. 2000). Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. *Bieghler,* 690 N.E.2d at 193. Appellate counsel is not deficient if the decision to present "some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." *Id.* at 194. Even if counsel's choice is not reasonable, to prevail, petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. *Id.* An appellate ineffectiveness claim challenging the quality of counsel's actual presentation of a claim must "overcome the strongest presumption of adequate assistance." *Id.* at 196. If the claimed issues were presented by appellate counsel and analyzed by an appellate court, relief will only be afforded when the "appellate court is confident it would have ruled differently." *Id.*

The defendant contends that if his appellate counsel would have better presented the issue of overlapping aggravators, there is a reasonable probability that he would have prevailed on appeal. The issue was presented and

extensively addressed on direct appeal. *Stevens,* 691 N.E.2d at 433-34. The defendant does not persuade us that this issue presented or argued differently would have produced a different result.

The defendant also claims ineffective assistance of appellate counsel alleging that his appellate counsel failed to argue that his sentence was unreliable due to a reduction in the jury's sense of personal responsibility because prospective jurors were "repeatedly reminded that they were only recommending a sentence [and two jurors] were exposed to a prospective juror's comments that she could rationalize rendering a verdict on the ground that the judge would be making the final decision." Br. of Petitioner-Appellant at 66. The post-conviction court found that no evidence was produced at trial or on post-conviction that the jury's sense of personal responsibility was reduced, and that petitioner did not demonstrate that this issue was of greater merit than the issues actually raised on appeal. Record at 740.

The jury selection process lasted five days. The defendant does not cite the record or otherwise direct our attention to the instances in which he claims that prospective jurors were "repeatedly reminded that they were only recommending a sentence." As to his allegation that two jurors overheard another prospective juror's comment, there was no objection by trial counsel, nor did trial counsel challenge to remove the two jurors who overheard the comment.

As noted above, with respect to the defendant's challenge to his appellate counsel's strategic decision to include or exclude this issue, we should be particularly deferential "unless such a decision was unquestionably unreasonable." *Bieghler,* 690 N.E.2d at 193-94. The defendant has failed to demonstrate that his appellate

counsel's decision to omit this issue was unreasonable. The defendant has likewise not shown a reasonable probability that the outcome of the direct appeal would have been different if the issue had been presented. We agree with the decision of the post-conviction court to deny relief as to the defendant's claim of ineffective assistance of appellate counsel.

As to the defendant's assertion that his appellate counsel failed to adequately argue that the State improperly injected victim impact evidence by its use of a photograph of Zachary holding a fish, the designation of alleged ineffective appellate counsel in his petition for post-conviction relief does not identify any claim regarding victim impact evidence or mention the State's use of the photograph. The defendant's petition for post-conviction relief does claim that his appellate counsel was deficient in failing to adequately present a claim that the trial outcome "was unfair and unreliable due to the injection of irrelevant and prejudicial evidence proscribed by Ind. Evidence Rule 404(b),"[9] Record at 70, but the argument in his appellate brief does not refer to any claimed violation of Rule 404(b). We deem this claim to be procedurally defaulted. *See* P-C.R. 1(8); *Allen,* 749 N.E.2d at 1171. Similarly, the defendant's claim that his appellate counsel failed to raise issues of governmental interference was not designated in his petition for post-conviction relief and is thus likewise not available. Furthermore, we have already discussed both of these claims in the context of the defendant's allegations of ineffective assistance of counsel at trial.

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[9] Ind.Evidence Rule 404(b) prevents the admission of evidence regarding "uncharged misconduct" or "prior bad acts" to prove a person's character.

4. Lethal Injection, Sentence Reliability

The defendant challenges the denial of his post-conviction claims that Indiana's lethal injection execution scheme violates international law, and that it contravenes evolving standards of decency, that it constitutes cruel and unusual punishment, and that his death sentence is unreliable.

The first three of these claims were available but not presented on direct appeal and may not be asserted as post-conviction claims. *See Timberlake,* 753 N.E.2d at 597. As to the defendant's claim that his death sentence is unreliable, he asserts that the "jury and the judge were never provided information necessary to make an informed judgment as to the appropriate sentence." Br. of Petitioner-Appellant at 68. He argues that the jury was not informed about his mental disabilities and their interaction with his drug abuse and that the jury was not given a proper understanding of the sentence life without parole. We have considered these claims in the context of his assertions of ineffective assistance of counsel. We decline to consider sentence reliability as an independent freestanding post-conviction claim. *See Saylor v. State,* 765 N.E.2d 535, 544 n.1 (Ind. 2002); *Wrinkles,* 749 N.E.2d at 1187 n.3; *Allen v. State,* 749 N.E.2d 1158, 1176 n.28 (Ind. 2001).

5. Incomplete, Unfair, and Biased Post-Conviction Relief Adjudication

(a) Use of State's Proposed Findings of Fact and Conclusions of Law

The defendant claims that he was denied a full, fair and unbiased adjudication of his post-conviction claims when the post-conviction court essentially adopted verbatim the proposed findings of fact and conclusions of law submitted by the State. In *Prowell v. State,* 741 N.E.2d 704 (Ind. 2000),

we acknowledged that a trial court's verbatim adoption of a party's proposed findings may have important practical advantages and we expressly declined to prohibit the practice. *Id.* at 708-09. We noted, however, that the wholesale adoption of one party's findings results in an "inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." *Id.* at 709; *see also Wrinkles,* 749 N.E.2d at 1188.

The sixty-five pages of findings and conclusions entered by the post-conviction court are for the most part identical to the proposed findings submitted by the State, but we note several differences. For example, the post-conviction court added two sentences to one issue, a couple of paragraphs to another, and corrected some of the misspellings. It is thus evident that the court carefully considered and purposefully used of the individual findings proposed by the State. The extensive findings of fact and conclusions of law addressed all the claims delineated in his petition. While near verbatim reproductions may appropriately justify cautious appellate scrutiny, we decline to hold that the post-conviction court's utilization of the State's proposed findings in the present case constituted a failure to provide the defendant with a full, fair and unbiased adjudication of his post-conviction claims.

(b) Failure to Recuse

Stevens claims his right to a full, fair and unbiased hearing was also violated by the post-conviction judge refusing to recuse himself. Judge Heid[10] presided over the post-conviction trial and also over the original trial. The defendant sought the judge's recusal on grounds that he

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[10] Judge George Heid died during the pending of this appeal.

intended to interview Judge Heid as a potential witness on the stun belt issue. *See* Ind.Judicial Conduct Canon 3(E)(1).[11] Judge Heid denied the motion, ruling that his testimony would be cumulative to the testimony of counsel.

The defendant does not challenge Judge Heid's impartiality, but rather he asserts that he was denied the opportunity to interview Judge Heid as a potential witness, which hobbled his case. In denying the motion to recuse, the trial court stated:

> Well throughout the proceedings that were conducted here, the State was represented by three attorneys and the defense was represented by two attorneys and to the extent there were any conversations about procedural issues or housekeeping matters that for some reason may not have been recorded, I think all or almost all of those people were in attendance. I know if there were discussions about security issues the sheriff was in attendance with perhaps another deputy, and so I think there's ample witnesses who can testify about those conversations to the extent they took place without the requirement of calling the trial judge as a witness to add cumulative,

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[11] Indiana Judicial Conduct Canon 3(E)(1) provides:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

. . . .

(b) . . . the judge has been a material witness concerning [the matter in controversy].

> perhaps cumulative testimony, and it seems however that the crux of this issue comes down to why was the decision made not to object and whether it was favorable or unfavorable to Mr. Stevens to have a stun belt rather than some other kind of restraint and the thought process, those decision making is – it's an internal process of the defense of which the court had no knowledge or certainty wasn't privy to the defense strategy in this matter and I would not be able to provide any helpful information about how that decision came about or whether it was favorable or unfavorable to the defendant. And also given the amount of work that's been done in this case in preparing it to this point, it's been pending since May of last year, and here we are ten days from a week long trial, it just seems to me that this really isn't an appropriate situation for me to recuse myself and have you start all over with someone else in this case. So with due respect to your motion here, I think it should be and it is denied. We'll go ahead and I'll stay on the case.

Record at 952. We discern no error in the trial court's denial of the defendant's motion to recuse.

Conclusion

We affirm the judgment denying the defendant's petition for post-conviction relief.

SHEPARD, C.J., and SULLIVAN, BOEHM and RUCKER, JJ., concur.

STATE OF INDIANA	)	IN THE SUPERIOR
COUNTY OF	)	COURT NO. 2
TIPPECANOE	)	CASE NO.
CHRISTOPHER M.	)	79D02-9805-PC-8
STEVENS,	)	TRIAL CASE NO.
	)	79D02-9402-CF-24
Petitioner,	)	
v.	)	
STATE OF INDIANA,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ON PETITION FOR POST-CONVICTION RELIEF

This matter comes before the Court upon the petition for post-conviction relief originally filed by Petitioner, Christopher M. Stevens, on December 1, 1998, amended on April 15, 1999, and further amended July 21, 1999; and upon the answer filed by Respondent, the State of Indiana, on February 3, 1999. The Court held an evidentiary hearing on August 23, 1999, through August 25, 1999. Petitioner appeared for that hearing in person and by counsel, Deputy Public Defenders Thomas Hinesley, Barbara S. Blackman, Danielle Gregory, and Andrew J. Borland. Respondent, the State of Indiana, appeared by counsel, Deputy Attorneys General Andrew L. Hedges, Christopher Worden, and Joseph L. Champion.

This matter was litigated on the above dates. The petition was taken under advisement. The parties submitted proposed findings of fact and conclusions of law on September 7, 1999. Having reviewed the evidence, the pleadings, and the opinion of the Supreme Court of Indiana affirming petitioner's conviction and capital sentence on direct review, the Court now enters the

following Findings of Fact, Conclusions of Law and Judgment on the Petition for Post-Conviction Relief.

Findings of Fact

The Crime[12]

Stevens was convicted of child molesting, a class C felony, in Marion Superior Court, Criminal Division, on February 17, 1993 (R. 4498).[13] He was sentenced to four years, with one year executed and three years suspended and on probation, and given 85 days credit (R. 4493). He was released from the Marion County Jail on probation in May 1993 (R. 4576; State's Ex. 34). The night before Stevens' release from jail, his cellmate, Tracy Eastin, predicted that Stevens would be back within two months (R. 4587). Stevens responded, "No, I won't. Next time, I'll kill him" (R. 4587).

Upon his release from jail in May 1993, Stevens returned to live at his father's residence in the Stardust Hills subdivision in Cloverdale, Putnam County, Indiana (R. 3933, 3990, 4093-94, 4303). Zachary Snider, who was

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12 On direct appeal, the Supreme Court of Indiana set forth the facts of the crime and the investigation that led to Petitioner's arrest and conviction for the murder of Zachary Snider. *See Stevens v. State*, 691 N.E.2d 412 (Ind. 1997). Because the reasonableness of trial counsel's actions is challenged here, this Court makes the following findings which are supported by the record and the evidence presented at the post-conviction hearing.

13 "R.___" refers to the record of proceedings from Petitioner's trial and direct appeal which was admitted into evidence as Petitioner's Exhibit 1 at the evidentiary hearing on post-conviction review. "T.___" refers to the transcript of the post-conviction hearing. For portions of the transcript that have not been transcribed and numbered, the Court will refer to the witnesses' testimony or the exhibit number.

ten years old, also lived in Stardust Hills with his parents, Todd and Sandi Snider, approximately one-quarter mile away from where Stevens lived (R. 3978, 4117). During the summer of 1993, Stevens attended at least one of Zachary's Little League baseball games, videotaped it, and offered five dollars to anyone on the team who would hit a home run (R. 4108-12, 4117-20). On one occasion in mid-June 1993, Zachary's father found out that Stevens had driven Zachary to a location outside the neighborhood to go fishing. When he found Stevens, Mr. Snider warned him to stay away from Zachary (R. 4172-74).

During the late morning of July 15, 1993, Zachary rode his bicycle to the home of his young friend, Alex Krouse, who also lived in the subdivision (R. 4093-98). After an hour or two, Zachary looked over to Stevens' house just across the road and said he was going over there (R. 4100-02, 4106). Zachary rode off on his bicycle and a short time later Krouse saw Zachary's bicycle in Stevens' yard by the sidewalk leading to his house (R. 4105). Krouse left his home at 1:45 p.m. that day and did not see Zachary again (R. 4105, 4113). Another neighbor saw Zachary shortly after 2:00 p.m. when he arrived and collected money for mowing her lawn (R. 4128-31). At approximately 2:30 p.m., Mr. Snider saw Zachary at home in the garage and then saw him go into the house. Within a few minutes Zachary was gone, as was his bicycle (R. 4162-66).

That same afternoon, another resident of the subdivision, Mark White, received a telephone call from Stevens asking for White's immediate help in getting a wagon back into his garage (R. 4180). When White arrived, he saw the garage door up and the wagon's wheel was stuck on the side of the driveway. White helped Stevens move it into the garage (R .4176-80).

The Sniders began searching for Zachary when dinner was ready at 7:00 p.m. (R. 4166). As Mrs. Snider was driving around at 8:00 p.m., Stevens played basketball with White (R. 4181-82, 4215). When Krouse's parents began assisting in the search for Zachary, Stevens told them he had been sleeping that day until 3:00 or 3:30 p.m. and had not seen Zachary all day (R. 4106, 4122-23). Mr. Snider called police at 9:00 p.m. (R.4168). About fifteen minutes later, Stevens arrived at the Sniders' home, said that he saw police and wanted to know what was going on (R. 4168-69). Stevens told Mr. Snider that he had been sleeping till 3:00 that day and got up and put his car in his garage when it started raining (R. 4171).

Stevens took some fliers Mr. Snider had printed (R. 4170-71) On July 16, Stevens and Jason Byrns drove around and passed out the fliers (R. 4216-20). Stevens told Byrns, "I wonder where Zach can be" (R. 4221).

On July 17, the Cloverdale Police Department requested assistance from the Indiana State Police (R. 3931, 3839-40, 4005). At that time, several hundred people including civilians, police officers from various agencies, and members of volunteer fire departments were conducting a massive search for Zachary (R. 3841-42). State Police Detective Josh Mishler was questioning the Sniders at their residence on July 17 when he saw Stevens drive by (R. 3845, 3848, 3859). After stopping, Stevens admitted to Det. Mishler that he knew Zachary, but he denied seeing him on July 15. He admitted Zachary might have knocked on his door, but maintained he did not answer the door and slept until about 4:00 p.m. (R. 3864-66). When Mishler suggested he had evidence that Zachary's bike was seen at his house on that day, Stevens became agitated and began to leave (R. 3867). However, Stevens returned and admitted that he had seen Zachary that day (R. 3866-69).

On July 19, Stevens went to his older brother, Mark Stevens, and confessed to killing Zachary (R. 4245, 4248-49). Stevens admitted that he was home in bed when Zachary came over, parked his bike in the garage, came inside and woke Stevens up (R. 4249). Stevens also described how he tried to choke Zachary, pushed his face into a pillow, and grabbed a cord (R. 4249). Stevens said he backed his car into the garage, put Zachary and his bicycle inside, covered them, took them to a bridge, dumped them there, and later returned to get a bag which he discarded (R. 4251, 4253). Stevens also gave his brother directions to the bridge where he dumped the body (R. 4252).

Mark Stevens went to police on July 21. He introduced himself to State Police Detective Richard Rice as Petitioner's brother, said he knew who killed Zachary, and reported his brother's confession (R. 3962, 4247-49, 4255-56). After speaking with Mark Stevens, Det. Rice and Det. Mishler went to the bridge Stevens had described on the afternoon of July 21 (R. 3879-80). The bridge was located in a secluded rural area in Putnam County "in the middle of nowhere" and was surrounded on both sides by overgrown vegetation (R. 3699, 3875, 3879-80). There was no home or structure within sight (R. 3699). Under the bridge they found a bicycle and the decomposing body of a boy (R. 3710, 3717). The surface beneath the bridge where the body and bicycle were lying was wet and rocky (R. 3705-06). Mr. Snider later identified the bicycle as Zachary's (R. 4161).

After obtaining a warrant for Stevens' arrest, Det. Rice arrested Petitioner at his home at 7:00 p.m. on July 21 (R. 3933). Rice transported Petitioner to the State Police post in Putnamvillie (R. 3934). After Rice fully advised Stevens of his Miranda rights, Petitioner agreed to talk with police (State's Ex. 15).

In a videotaped confession, Petitioner told police that on Thursday just after he woke, Zachary came over, knocked on the door, and came in for a short time. Zachary said he would return and left to pick up some money, talk to his father, and change clothes. When Zachary returned, Petitioner said, they talked and then went to Stevens' room and began "messing around." When asked what that meant, that admitted that it involved them performing oral sex. When asked if they had planned to do that, Petitioner said that it was an "unsaid thing" and had been going on between them for two or three months (State's Ex. 15).

According to Petitioner, Zachary then threatened to tell his parents about Petitioner having sex with him. Petitioner said Zachary was mad and asked Petitioner about a rumor concerning Petitioner sleeping with Zachary's mother. Petitioner told police that he (Petitioner) was scared because he had just gone through "a bunch of shit in Indy" and thought, "[N]o, I'm not going, I'm not going to go through this again" (State's Ex. 15).

Petitioner said that they had sex some more and that when they were done, he led Zachary by the hand into his brother's room. Once on the bed, Petitioner placed a pillow over Zachary's face in order to suffocate him, but Zachary kept telling Petitioner that he loved him. Unsuccessful in his attempt at suffocation, Stevens looked around and spotted a cord on the Sega controller, which he then wrapped around Zachary's neck and pulled hard to strangle Zachary. Petitioner then took the cord off and Zachary lay there for about five minutes as Petitioner walked around thinking what to do. When Zachary started to gasp, Petitioner went to the kitchen and grabbed a trash bag. Petitioner then wrapped it over Zachary's head, leaving Zachary unconscious. Petitioner then moved Zachary to Petitioner's bed (State's Ex. 15).

Petitioner explained that Zachary's bicycle was already in the garage because whenever Zachary would visit, Petitioner would have him put the bicycle in the garage "so nobody would see." Petitioner moved some things out of the garage and pulled his car in the garage. He threw Zachary's bike into the back of his car, threw Zachary into the back of the car, and then covered them. Petitioner then drove away until he found a small bridge where he stopped and threw Zachary and then his bicycle over. Because the bicycle was caught in a tree, Petitioner "jumped down there" and pulled Zachary and his bicycle beneath the bridge. He left the bag on Zachary's head. He explained to police that when he returned home about 4:00, he enlisted Mark White's assistance in returning a trailer and several other displaced items into his garage. He said he used Lysol to spray his bed, his brother's bed, his car and the cover he used (State's Ex. 15).

Petitioner explained that he became fearful that police would match the bag to bags in his house, so he drove back to the scene later that night or very early the next morning and removed the bag from Zachary's head. After driving away from the bridge and making a turn, Petitioner threw the bag out the window. He described the bag as green on the outside and black on the inside (State's Ex. 15).

The same day, July 21, Putnam County Sheriff's Detective Michael Biggs and State Police Sergeant Gary Hood went in search of that trash bag (R. 3894-95). They found a dark green one similar to the one they were looking for along the road in a location a little over a mile away from where the body was found (R. 3896-3899, 4040, 4025). The bag contained nothing other than road dust and dirt and it was stretched out on one corner; other bags they had observed during the search had garbage in them (R. 3897, 4040, 4070). Later the same day, police found similar trash bags and a Sega Genesis video game

with cords in Petitioner' home (R. 4041-54, 4057, 4061, 4230, 4238).

Pretrial Proceedings

In addition to the foregoing, the following additional facts regarding the pretrial and trial proceedings are supported by the record and were established at the hearing on post-conviction review. Petitioner appeared for an initial hearing on the charges related to the murder of Zachary Snider and was immediately appointed counsel (R. 3). The State filed the death penalty request on July 30, 1993 (R. 54). Jeffery Baldwin and Robert Clutter entered appearances on behalf of Petitioner on August 9, 1993 (R. 58). On August 17, 1993, the trial court found that Baldwin and Clutter met the requirements of Indiana Criminal Rule 24 and formally appointed them to represent Petitioner (R. 59).

Baldwin served as lead counsel (R. 58). At the time of his appointment to this case, Baldwin had significant criminal law experience, having represented three other defendants in death penalty cases (Baldwin's Evidentiary Deposition 3-4). All of Baldwin's former capital defendants received terms of years (Baldwin 4). One former capital defendant entered into a plea trial plea agreement, and two received terms of years after jury trials (Baldwin 4).

Robert Clutter served as second chair (R. 58). At the time of his appointment in this case, Clutter had been an attorney for approximately five years, practicing primarily in the area of criminal defense (T. 412). He had previously represented defendants in major felony cases, and had also represented one capital defendant (T. 412). That defendant did not receive a death sentence (T. 412).

Both Baldwin and Clutter were qualified for their respective roles in this case under Criminal Rule 24 (R. 59). Both attorneys had attended one or more death penalty seminars sponsored by the Indiana Public Defender Council (T. 413; Baldwin 5-6). The attorneys assembled a defense team consisting of Investigator Larry Atwell, and Paralegal Heidi Marshall, and mitigation specialist Carol Knoy (T. 16-17; 417-18).

Carol Knoy joined the defense team in December 1993 (T. 14). Knoy had been employed as a sentencing consultant and mitigation specialist for nine years prior to Petitioner's trial; before that, she served as a law enforcement officer in Indianapolis and Marion County for a period of ten years (T. 12). Knoy completed the Indiana Public Defender Council's death penalty mitigation training course, and thereafter attended several two-day seminars offered by the Indiana Public Defender Council (T. 13). In addition, Knoy had a bachelor's degree in Criminal Justice, had completed IPD's Police Department Academy, and had been trained by the FBI (T. 13). Knoy had previously served as a mitigation specialist on two other capital cases (T. 13).

In addition, the attorneys hired a psychologist, Dr. Lawrence Lennon, who examined Petitioner and testified for the defense during the penalty phase of the trial (T. 420; R. 5290). Dr. Lennon was recommended by Knoy, who was impressed by Lennon's testimony in the Steven Holmes capital trial (T. 15, 420). Other members of the criminal defense community likewise informed Baldwin and Clutter that Dr. Lennon had "done a very nice job on Holmes" (T. 420). Before deciding to hire Dr. Lennon, Clutter obtained a transcript of Dr. Lennon's testimony in Holmes (T. 441). Clutter testified that he believed that Dr. Lennon would be a "good fit" because of certain similarities between Holmes' and Petitioner' abusive

childhood (T. 441). Similarly, Clutter believed that Dr. Lennon's background in child and adolescent psychology would be helpful to the defense in this case (T. 441).

Dr. Lennon holds a Ph.D in Clinical Psychology from Miami University in Ohio (R. 293). From 1973 to 1979, Dr. Lennon served as a Psychology Professor at St. Joseph's College in Rensselaer, Indiana (R. 294). From 1975 to 1979, Dr. Lennon was Chairman of the Psychology Department (R. 294). From 1991 to 1994, Dr. Lennon served as Clinical Director of Humana Hospital – Indianapolis, Child and Adolescent Psychiatric Center (R. 294).

Dr. Lennon conducted a preliminary evaluation of Petitioner prior to April 13, 1994 (R. 292). From June through December 1994, Dr. Lennon met with Petitioner on five different occasions (R. 5311). Dr. Lennon also spoke to Petitioner's parents and siblings (R. 5310). Dr. Lennon received and reviewed a "suitcase full of data" about Petitioner, including school records, records from the Hamilton Center, and arrest records (R. 5310). Dr. Lennon also had other individuals from his office participate in Petitioner's evaluations, including a social worker and another psychologist, Dr. Nethercott (R. 5312).

Clutter and Baldwin both testified that they had some disagreements with Putnam County Judge LaViolette concerning her approval of their bills (T. 415-16; Baldwin 7-9). Clutter described the relationship as "antagonistic" (T. 416). Baldwin described dealing with Judge LaViolette as "difficult" (Baldwin 7). Although both attorneys objected to the time needed to resolve the billing disputes, both agreed that the disputes did not prevent them from taking any particular step or cause them to forgo any particular part of their defense (T. 416, 437; Baldwin 80). Petitioner's case was venued to Tippecanoe County in February 1994 (R. 193). After Petitioner's case was moved

to Tippecanoe County, Clutter testified that there was "absolutely" an improvement regarding billing procedures (T. 437).

Petitioner's counsel sought discovery and filed multiple pretrial motions, including motions to suppress, motions in limine under Evidence Rule 404(B), motions to dismiss, and successful motions for change of judge and change of venue (R. 97, 179, 184, 280, 336-41, 375). Counsel also prepared and filed briefs in support of their various motions.

Trial proceedings

During *voir dire*, counsel extensively questioned prospective jurors and used 17 of the 20 preemptory strikes allowed for a defendant in a capital case (R. 3473).

In addition to the foregoing evidence that Petitioner killed Zachary Snider, the State and Petitioner presented the following evidence:

Pathologist Dr. Dean Hawley performed an autopsy on the body on July 22, 1993 (R. 3724-25). He observed that the body was of a preadolescent male in an advanced state of decomposition with hair consistent with the Caucasian race (R. 3730, 3747-48). Though unable to determine the cause of death, he did observe that there were no broken bones and no evidence of any penetrating injury such as a gunshot or stab wound to the chest, abdomen or lower extremities (R. 3730-31, 3749). Also, the child's heart appeared normal and there was no evidence of disease in the lungs, liver or kidneys (R. 3748-49). Dr. Hawley found nothing in his autopsy that would be inconsistent with death by asphyxiation or suffocation (R. 3732-34). He was unable to estimate an exact time of death but could say that the boy had been dead "for more than hours and less than months" (R. 3752-53).

A forensic entomologist examined insect samples taken from the body during the autopsy and from the soil where the body was found (R. 3784-3785, 3792). He concluded from the nature and extent of insect infestation in the body that the likely time of death was between noon and sunset on July 15 (R. 3794-3804).

A forensic dentist compared a jaw extracted during the autopsy to dental x-rays taken of Zachary Snider in February 1993 and confirmed that the jaw and the x-rays had been taken from the same person (R. 3749, 3759-72).

In August 1993, Marcia Stevens, Stevens' stepmother, received a letter written by Petitioner in the mail (R. 4297, 4309). In the letter, Petitioner apologized for "killing someone" in her house and said he was "nothing but a worthless, perverted peice [sic] of trash" (R. 4309). Tracy Easton also received a letter from Petitioner during this same time period, part of which stated, "You know your prediction was right. You said you thought I'd be right back in jail two months after I got out. Well, I was back in four days short of two months. I think you might have cursed me. HA! HA! (R. 4583).

The jury found Petitioner guilty of three counts of murder (R. 3179-81). The jury recommended the death penalty. The trial court imposed the death penalty (R. 3379-80).

Direct Appeal

Petitioner appealed his convictions and death sentence to the Indiana Supreme Court. Petitioner was represented in that appeal by attorneys Brent Westerfeld and Jeffrey Baldwin. The Supreme Court rejected every argument and unanimously affirmed Petitioner's convictions and death sentence. *Id.* at 1158-73.

Post-conviction proceedings

Petitioner, thereafter represented by his current counsel with the Office of the State Public Defender, filed his notice of intent to file a petition for post-conviction relief. Petitioner did so and, as amended, the petition raises 48 claims

In addition to the foregoing, the following facts were also established at the hearing on the post-conviction petition.

During Petitioner's trial, Petitioner was required to wear a "stun" belt, also described as a "RACC" belt (T. 213). Petitioner wore the belt underneath his clothing around his waist (T. 217). Petitioner wore the belt over his T-shirt and under his sweater (T. 217). The belt contained two prongs that rested against Petitioner's lower back (T. 217). Petitioner was informed that sheriff deputies would never use the belt unless be tried to escape or leave the courtroom or harm someone (T. 214). The belt allowed Petitioner to consult with his counsel without a deputy in close proximity. The deputies operating the RACC belt testified that they had used it on themselves, and described how the belt "certainly wasn't painful," but would bring most people down to their knees (T. 218). Neither Baldwin nor Clutter objected to the stun belt (T. 434). The belt was never activated while Petitioner wore it. The stun belt was not visible to jurors during the trial (T. 74-89). At one point during the trial, Petitioner told Clutter that the prongs of the stun belt were poking him in the back (T. 435). At the next recess, Clutter spoke to a courtroom deputy, who loosened the belt or replaced Petitioner's T-shirt under the prongs (T. 435-36).

Petitioner also introduced evidence regarding the method in which executions are carried out in Indiana. The facts supporting this claim were presented within a transcript of the testimony of Al Parke, the former

Superintendent of the Indiana State Prison, from *Kerrie Price v. State*, in Marion County. Petitioner's Exhibit 13. Respondent offered a transcript of Price's testimony in *James P. Harrison v. State*, Cause No. 65C01-9104-CF-00008, in Posey County. Respondent's Ex. E. That testimony was offered in *Harrison*, another capital post-conviction case, in support of Harrison's claim challenging lethal injection. Resp's Ex. E. That testimony also includes exhibits showing drug information and the execution protocols. Parke's testimony recounts his qualifications and his experience observing the execution of Tommie Smith, Indiana's first execution by lethal injection. Parke also testified in great detail about: (1) the members of the execution team, including their qualifications and selection; (2) the substance injected; (3) the development of Indiana's procedure; and (4) the actual procedure employed.

Conclusions of Law

Standard of Review.

"Post-conviction procedures do not afford the convicted an opportunity for a 'super-appeal.' Rather, they create a narrower remedy for subsequent collateral challenges to convictions, challenges which must be based on the grounds enumerated in the post-conviction rules." *Matheney v. State*, 688 N.E.2d 883, 890 (Ind. 1997) (citing *Weatherford v. State*, 619 N.E.2d 915 (Ind. 1993)). The petitioner bears the burden of proving his actual claims by a preponderance of the evidence. *Matheney*, 688 N.E.2d at 890 (citing Ind. Post-Conviction Rule 1 § 5; *Weatherford*, 619 N.E.2d at 917).

Claims which were or could have been raised on direct appeal are not available for review in a post-conviction relief proceeding. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997) (citing *Weatherford*, 619 N.E.2d at 917); *Lowery v. State*, 640 N.E.2d 1031 (Ind. 1994) (claims available but

not raised on direct appeal are waived). However, claims of ineffective assistance of counsel are available during post-conviction proceedings as long as no ineffective assistance of counsel claims were raised on direct appeal. *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998).

Further, issues raised on direct appeal and decided adversely to the defendant are in *res judicata* and may not be litigated again in a post-conviction proceeding. *Smith v. State*, 613 N.E.2d 412, 413 (Ind. 1993); *Cambridge v. State*, 468 N.E.2d 1047, 1049 (Ind. 1984). Utilizing the post-conviction relief procedures "to request a relitigation or redetermination of facts and law previously decided in order to prolong[,] postpone or prevent the ultimate execution of the death sentence" will not be allowed. *Smith*, 613 N.E.2d at 414. The bar of *res judicata* applies even where the defendant attempts to raise the same issue by designating it differently. *Harding*, 545 N.E.2d at 17. Although a court may revisit a prior decision, it should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice. *Arthur v. State*, 663 N.E.2d 529, 531 (Ind. 1996).

The Claims.

Claims 8(A), 9(A)–Ineffective assistance of trial counsel

Generally, in order to succeed on a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test to show that counsel was unconstitutionally ineffective. First, a defendant must show that counsel's performance was deficient, and second, he must show that this deficient performance prejudiced him. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 122 L.Ed.2d 130, 113 S. Ct. 838 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel's performance should be measured by an objective standard

of reasonableness "under prevailing professional norms." *Strickland*, 466 U.S. at 688. Moreover, to demonstrate prejudice, Petitioner must demonstrate "that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Lockhart*, 506 U.S. at 369. Where it is easier to decide a petitioner's claims based on an absence of prejudice, that course should be followed.

Claim 9(A)(1): Counsel adequately investigated the facts and law related to the guilt phase of Petitioner's trial. With the exception of his more detailed claims set forth below, Petitioner has not come forth during the post-conviction proceedings with any explanation of which facts or law counsel unreasonably failed to investigate. Because Petitioner has not presented any evidence supporting this claim, he has abandoned it. *McKrill v. State*, 452 N.E.2d 946, 948 (Ind. 1983).

Claim (A)(2): Counsel was not ineffective for failing to timely seek and secure necessary and appropriate investigative and expert assistance during the trial.

1. Mental health expert

Defense counsel selected Dr. Lennon after learning that he testified in a prior capital case, after receiving favorable reports of his work from other members of the criminal defense bar, after reviewing his background, and after examining a transcript of Dr. Lennon's testimony in another capital case. Moreover, counsel observed similarities between the abusive childhood of Petitioner and the abusive childhood of Steven Holmes, on whose behalf Dr. Lennon testified in his previous capital case. Dr. Lennon was recommended by mitigation specialist Knoy, who was impressed by Lennon's testimony in the Steven Holmes capital trial (T. 15, 420). Other members of the criminal defense community likewise informed Baldwin and Clutter that Dr. Lennon had "done a very nice job on

Holmes" (T. 420). Before deciding to hire Dr. Lennon, Clutter obtained a transcript of Dr. Lennon's testimony in Holmes (T. 441). Clutter testified that he believed that Dr. Lennon would be a "good fit" because of certain similarities between Holmes' and Petitioner's abusive childhood (T. 441). Similarly, Clutter believed that Dr. Lennon's background in child adolescent psychology would be helpful to the defense in this case (T. 441).

Dr. Lennon holds a Ph.D in Clinical Psychology from Miami University in Ohio (R. 293). From 1973 to 1979, Dr. Lennon served as a Psychology Professor at St. Joseph's College in Rensselaer, Indiana (R. 294). From 1975 to 1979, Dr. Lennon was Chairman of the Psychology Department (R. 294). From 1991 to 1994, Dr. Lennon served as Clinical Director of Humana Hospital – Indianapolis, Child and Adolescent Psychiatric Center (R. 294).

As a separate part of his claim, Petitioner presented evidence suggesting that defense counsel unreasonably delayed in obtaining Dr. Lennon's services. However, the record demonstrates that Dr. Lennon performed a preliminary evaluation on Petitioner prior to April 13, 1994, well before Petitioner's February 1995 trial date (R. 292). Dr. Lennon also met with Petitioner on five different occasions between June and December 1994 (R. 5311). During this time, Dr. Lennon also spoke extensively with Petitioner's parents, siblings, and relatives (R. 5310). Dr. Lennon received and reviewed a "suitcase full of data" about Petitioner, including school records, records from the Hamilton Center, and arrest records (R. 5310). In addition, other professionals from Dr. Lennon's office were able to assist Dr. Lennon in conducting Petitioner's evaluations (R. 5312).

Finally, Petitioner claims that his trial attorneys were ineffective because they only hired one mental health expert. Petitioner supported this claim by presenting evidence in the form of testimony from Indianapolis Attorney Robert Hill that the consensus in the capital defense community was that defense attorneys required multiple mental health experts in capital cases (T. 499). Hill testified that he once hired four mental health experts for a capital trial (T. 499-500). However, it is well-settled in Indiana that a defendant is not entitled to an expert provided at taxpayer expense when the purpose of the examination is merely exploratory. *Hough v. State*, 560 N.E.2d 511, 516 (Ind. 1990) (citing *United States* ex rel. *Smith v. Baldi* (1953), 344 U.S. 561, 568, 73 S.Ct. 391, 395, 97 L.Ed. 549, 556 (1953). Petitioner presented no evidence at the post-conviction hearing that Petitioner's counsel knew or should have known of mental disabilities that would require the assistance of an additional expert witness. Indeed, Dr. Lennon's examination of Petitioner did not reveal the presence of any mental disabilities requiring the assistance of an additional expert witness. Nor did Petitioner present any evidence at the hearing demonstrating that if his trial counsel had sought the assistance of additional experts at public expense, such funding would have been approved.

Defense counsel acted reasonably in hiring Dr. Lennon as a mental health expert, given Petitioner's abusive childhood, Dr. Lennon's significant professional and educational background in treating and evaluating abused children, Dr. Lennon's testimony in the somewhat similar Steven Holmes capital case, and the positive recommendations Dr. Lennon received from members of the defense team as well as other members of the criminal defense bar.

Nor did defense counsel's decision to hire Dr. Lennon render the verdict in this case unfair or unreliable under the standard of *Strickland* and *Fretwell*. With the benefit of hindsight, Petitioner's present counsel suggest that trial counsel should have adopted the defense of mental disease or defect (Ind. Code § 35-41-3-6) and should have presented psychiatric evidence suggesting that Petitioner was unable to form the *men rea* necessary to commit intentional murder. However, if Petitioner had raised the insanity defense, he would have opened the door to the admission of incriminating evidence that was not presented during the guilty phase of his trial. *See, e.g., Benefiel v. State* 578 N.E.2d 338 (Ind. 1991) (Defendant's insanity plea opened door to all evidence relating to defendant and his environment). Specifically, had Petitioner presented an insanity defense, the State would have been permitted to introduce the testimony of Tracy Eastin during the guilt phase. Eastin's testimony was that Petitioner planned to kill his next child molesting victim to avoid returning to jail (R. 4587). This testimony was bolstered by a letter Petitioner wrote to Eastin in which Petitioner recalled their earlier conversation (R.4583). Moreover, the facts of the crime itself militate against insanity. First, Petitioner attempted to kill Zachary by smothering him with a pillow (R. 1198). When this did not work, Petitioner left the bedroom, found a cord, and strangled Zachary with the cord until he believed that Zachary was dead (R. 1198). A short time later, Petitioner heard Zachary gasping, realized that he was not dead, and placed a plastic garbage bag over his head to suffocate him (R. 1199). After he killed Zachary, Petitioner took extensive steps to cover up the crime: (1) he placed Zachary and his bicycle into the trunk of his car and threw them beneath a remote bridge; (2) when Petitioner realized that Zachary's body could be seen from the bridge, he

adjusted its position so that it would be concealed from passers-by; (3) as Petitioner was driving away from where he had hidden the body, he realized that garbage bag he used to suffocate Zachary could be tied to him, so he returned to the bridge and removed the bag (R.). Later that day, Petitioner feigned ignorance as to Zachary's whereabouts and assisted in the search (R. 1199-1202). Petitioner's actions in covering up the crime were so well planned that, despite police suspicion, neither Zachary's body nor Petitioner's participation in the crime were discovered until Petitioner confessed to his brother (R. 1188). Against this backdrop, Dr. Coons' testimony that, in his opinion, Petitioner's ability to appreciate the wrongfulness of his conduct was "impaired" would have had little or no effect on the jury's verdict, particularly in light of Dr. Coons' acknowledgement that Petitioner could appreciate the wrongfulness of his conduct when he took steps to hide Zachary's body.

Finally, as the evidence at the post-conviction hearing demonstrated, admissible psychological evidence revealed during Dr. Coons and Dr. Kaplan's examinations of Petitioner would have made the penalty phase much more difficult for trial counsel. Specifically, both Dr. Coons and Dr. Kaplan believed that Petitioner forced Zachary to have sex with him; Dr. Kaplan described this as a forcible rape (T. 389). By contrast, the evidence presented at trial suggested that Petitioner's molestation of Zachary was consensual (State's Ex. 15) and had occurred on multiple occasions. Thus, if Petitioner's trial counsel had presented an insanity defense, by the time of the penalty phase, the jury would consider Petitioner to be a violent sexual predator who, by the age of 22, had already molested dozens of boys. The jury would not consider such a violent, voracious predator as someone deserving a penalty less than death.

2. Toxicology expert

Defense counsel were not ineffective for failing to hire a toxicologist to offer expert testimony about Petitioner's use of drugs or alcohol. According to Dr. Kaplan, Petitioner informed him that at the time of the murder "he was taking four to five hits of acid, of LSD, a day. And he had been doing that continuously for a month and, in addition to that, smoking marijuana and really not – not controlling his use" (T. 351). However, when Petitioner gave his confession to police, he stated that he "used to do drugs, used to drink," but that he stopped drinking when he got arrested for child molesting, and "had stopped smoking marijuana awhile before that, long before that, pretty much cause my sister got killed by a guy that was high and ever since then I had, I had gone from doing it heavy to real light and then stopped" (R. 1217). Petitioner's account of his drug use was bolstered by evidence presented at trial by Phil Needam, an addiction counselor at Koala who evaluated Petitioner in January 1993 and found that Petitioner did not have a drug or alcohol problem (R. 4666, 4678-79). The Court's pre-sentence report noted that Petitioner denied any drug use at the time of the crime (Ex 12). Thus, to the extent that Petitioner's present counsel are suggesting that trial counsel should have sought a toxicologist to present evidence of voluntary intoxication, this claim must fail because there was substantial evidence showing that Petitioner was not intoxicated at the time he committed the murder. Moreover, even assuming that Petitioner had consumed alcohol or drugs at the time of the murder, Petitioner would not be entitled to a voluntary intoxication defense because his actions in committing the present crime plainly show that he was not so intoxicated as to be unable to form the *mens rea* to commit the crime of murder. As the Indiana Supreme Court has repeatedly

emphasized, "[e]vidence that shows a defendant was not so intoxicated so that he could indeed form the requisite mens rea includes such things as his ability to devise a plan, operate equipment, instruct the behavior of others, or carry out acts requiring physical skill." *State v. Van Cleave*, 674 N.E.2d 1293, 1303 (Ind. 1996). In killing Zachary, Petitioner first attempted to use a pillow, then, recognizing that this was ineffective, used a game cord (R. 1298). Petitioner later realized that he had not succeeded in killing Zachary and employed a garbage bag to suffocate him (R.1299). After Zachary died, Petitioner was able to place Zachary and his bicycle in his trunk, drive to a remote location, hide Zachary's body and bicycle beneath a bridge, and return to his home (R. 1202). This evidence would preclude the giving of a voluntary intoxication instruction because it shows Petitioner's ability to plan, carry out complicated physical tasks, and operate a motor vehicle. Because substantial evidence suggests that Petitioner was not intoxicated at the time he committed the murder, defense counsel were not ineffective for failing to seek expert testimony from a toxicologist. Petitioner's self-serving and uncorroborated report to Dr. Kaplan, four years after the murder, that he had consumed four to five hits of LSD every day in the month preceding the crime is not credible. But even assuming that Petitioner had consumed drugs or alcohol on the day of the crime, the facts of the crime show that Petitioner was not so intoxicated that he could not form the *mens rea* to commit the murder, and defense counsel were not ineffective for failing to pursue such a defense.

This Court does not second-guess counsel's strategic decisions. *Wisehart v. State*, 693 N.E.2d 23, 45 (Ind. 1998). Furthermore, Petitioner has not demonstrated the defense, counsel used, rendered the result of the hearing unfair or unreliable. *Williams v. State*, 706 N.E.2d 149, 154 (Ind.

1999). Petitioner cannot show counsel was ineffective by offering an alternative defense. *Conner v. State*, 711 N.E.2d 1238, 1248-49 (Ind. 1999).

Claim 9(A)(3): Defense counsel were not ineffective for attempting to present a voluntary manslaughter defense. Attorneys Clutter and Baldwin were hamstrung in their defense of Petitioner because Petitioner confessed on three different occasions that he killed Zachary (R). Moreover, defense counsel were leery of having Petitioner testify because he would have been a bad witness (Baldwin 46, 87). In light of these facts, defense counsel reasonably attempted to pursue the only defense they felt they had available to them: voluntary manslaughter. The fact that the trial court eventually denied an instruction on voluntary manslaughter does not render counsel's decision to attempt to obtain such an instruction deficient performance. Clutter's billing records reveal that he spoke with Indiana Public Defender Council attorney Paula Sites about counsel's attempt to have the jury instructed on the defense of voluntary manslaughter (Ex. , 2-8-95). The billing records also disclose that Clutter spent time reviewing voluntary manslaughter cases (Ex. , 2-8-95).

While the trial court properly denied the voluntary manslaughter instruction, defense counsel's decision to pursue such a defense was not invalid on its face. Voluntary manslaughter is inherently included within the definition of murder. *Horan v. State*, 682 N.E.2d 502, 506-7 (Ind. 1997). "Any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter." *Roark v. State*, 573 N.E.2d 881, 882 (Ind. 1991) Sudden heat is defined as provocation that such emotions as anger, rage, sudden resentment, or terror are sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection. *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind.

1988). In this case, Mark Stevens trial testimony was that Petitioner "clicked" or "went off" when Zachary threatened to report him (R. 4258). Moreover, Petitioner stated in his confession that he killed Zachary because he was afraid that Zachary would report him (R. 4258). Defense counsel apparently hoped that the jury would receive a voluntary manslaughter instruction on the basis that Petitioner was in such fear or terror of being turned in that he "snapped" and, acting under sudden heat, killed Zachary. They were not ineffective for attempting to present such a defense. As the Seventh Circuit recently stated in a similar case:

> [The petitioner's] current lawyers assume that a good lawyer must be able to find some resource for every accused, no matter what the evidence shows. Not so. Some crimes are so heinous, and so well documented, that there is little to be done for the defendant. This is one of those crimes.
>
> *Tenner v. Gilmore*, 1999 WL 371675 *7 (7th Cir. 1999).

In any event, even assuming that trial counsel engaged in deficient performance for pursuing the defense of voluntary manslaughter, Petitioner has failed to show how he was prejudiced by this decision. Petitioner's trial attorneys pursued the most viable defense available to them, and even if this defense was destined to failure, Petitioner would have been in no better position had counsel elected not to pursue this defense at all. This court finds that Petitioner received the effective assistance of counsel.

Claim 9(A)(4): Defense counsel was not ineffective for failing to investigate and present evidence that would

provide a defense to the charge. This claim is addressed under Claim 9(A)(2), above.

Claim 9(A)(5): Defense counsel was not ineffective for failing to investigate and present evidence relevant to determining the voluntariness of Petitioner's confession. The record reveals that Petitioner was arrested at his home around 7:00 p.m. on July 21, 1993 (R. 1234, 1255). Petitioner was transported to the State Police Post in Putnamville, and taken to an interview room 10-15 minutes later (R. 1235-36). The videotaped confession itself shows that Petitioner was advised of his rights (State's Ex. 15). Petitioner affirmatively waived his rights and acknowledged that he had no problem talking with police (State's Ex. 15). When asked if he understood his rights and agreed to talk to the police without a lawyer, Petitioner answered, "Yeah" (State's Ex. 15).

During the post-conviction hearing, Dr. Coons pointed to two instances in the videotaped confession where he believed that Petitioner may have been dissociating (T. 286-88). However, Dr. Coons never offered an opinion as to whether these isolated instances may have rendered Petitioner's confession involuntary. Because Petitioner presented no testimony on this issue, this issue has been waived. *McKrill v. State*, 452 N.E.2d 946, 948 (Ind. 1983).

Waiver notwithstanding, this issue lacks merit. In *Connelly v. Colorado*, 479 U.S. 157, 166, 107 S. Ct. 515, 521 (1986), the United States Supreme Court held that a defendant's mental condition alone will not render a defendant's confession involuntary; coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. The Court explained that the purpose of the exclusionary rule was to

deter police misconduct, and absent any evidence of police misconduct, the exclusionary rule has no role. *Id.* The Indiana Supreme Court has adopted the analysis of the *Connelly* Court. *See Pettiford v. State*, 619 N.E.2d 928, 925 (Ind. 1993). Because there is no evidence of any police misconduct during Petitioner's confession, or otherwise, this claim fails. Petitioner's trial counsel were not ineffective for failing to investigate or present a meritless claim.

Claim 9(A)(9): Defense counsel were not ineffective for presenting penalty phase witnesses who offered opinions that Petitioner should receive a sentence of death Indeed, defense counsel did not offer any penalty phase witnesses who testified that Petitioner should receive a death sentence. During the sentencing hearing before the trial court, Petitioner's step-mother, Marcia Stevens, testified that she did not want Petitioner to receive the death penalty because he was one of her children (R. 5505). Marcia testified that Petitioner had done an awful crime, and that she could not say that he did not deserve the death penalty, but explained once again that she did not want him to receive the death penalty (R. 5506).

Petitioner's brother Mark Stevens testified at the sentencing hearing that he did not believe that Petitioner deserves the death penalty, although he did deserve to be punished for what he did (R. 5560). Mark explained that Petitioner had had a hard, difficult life, and that he should not receive the death penalty for this reason (R. 5560).

Defense counsel were not ineffective for calling Marcia Stevens to testify. Marcia informed the court that she did not want Petitioner to receive the death penalty (5505). The fact that she could not say that Petitioner did not deserve the death penalty does not mean that trial counsel should not have called her to testify. Having Petitioner's mother acknowledge that he has committed an

awful crime and still plead for mercy does not constitute ineffective assistance of counsel. This Court finds that Petitioner's trial counsel were effective.

Claim 9(A)(10): Defense counsel were not ineffective for failing to adequately assess, prepare, and present Dr. Lennon as an expert witness. As set forth more fully in Claim 9(A)(2), defense counsel's decision to hire and present Dr. Lennon as an expert witness was reasonable. There is no evidence in the record, and no evidence was presented at the post-conviction hearing, that defense counsel improperly prepared Dr. Lennon. While both Baldwin and Clutter complained that Dr. Lennon prepared a report, to the extent that preparing a report was error, it was not defense counsel's error, as they specifically instructed Dr. Lennon not to prepare such a report (T. 423; Baldwin 30). Defense counsel properly prepared Dr. Lennon to testify.

Claim 9(A)(11): Defense counsel were not ineffective for advising Petitioner not to testify. Contrary to Petitioner's claim, there is no evidence that defense counsel advised Petitioner not to testify because they hoped to receive a voluntary manslaughter instruction. On the contrary, defense counsel were concerned about having Petitioner testify because he was an chronic liar who would have been a bad witness (Baldwin 46, 87). Moreover, if Petitioner had testified during the guilt phase, there is a danger that he would open the door to otherwise inadmissible evidence. Defense counsel's advice that Petitioner not testify was a reasonable strategic decision based on sound professional judgment. Such strategic decisions will not support a claim of ineffective assistance of counsel. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997).

Claim 9(A)12, (13), (14): This Court finds that Petitioners trial counsel were not ineffective for failing to

move to strike jurors Hahn or Termine or for failing to exhaust their peremptory challenges. The use of challenges for cause and peremptory challenges are generally matters of strategy that the court is not permitted to second-guess. *See Taylor v. State*, 480 N.E.2d 924, 926 (Ind. 1985) (decision of whether to strike panel members from the jury was a "judgment call on strategy that does not amount to ineffective assistance of counsel").

As to Petitioner's claims 9(A)(12) and (13), juror Termine was removed by peremptory challenge so no harm befell Petitioner (R. 1832). While juror Hahn's nephew had been molested (R. 1863), Hahn said she could keep an open mind (R. 1940), that the fact someone was arrested does not connote guilt, and that she did not allow herself to be "bulldozed" (R. 1940, 1949, 2013). Given these facts, a challenge for cause would have failed. Nonetheless, Hahn stated that "there are times when it's okay to use the death penalty" (R. 1941) and that she could vote for the death penalty, "if the evidence warrants it, yes, but it has to really be proven." (R. 1942). These statements could have been interpreted as lukewarm support for imposing a death sentence. "It is quite plausible that counsel's 'failure' to move to strike these jurors was based on a conscious decision that the jurors were desirable from the defense point of view." *Baird v. State*, 688 N.E.2d 911, 916 (Ind. 1997). The strategy of not striking a juror whose support for the death penalty is lukewarm is particularly appropriate in a case such as this one, where the State's evidence was "extremely strong" and where defense counsel anticipated that the case would go to the penalty phase (T. 427). In any event, trial counsel should not be found ineffective for failing to strike a juror when the court's review of the record reveals that counsel challenged several jurors who stated strong opinions

against Defendant's interests. *Wisehart v. State*, 693 N.E.2d 23, 46 (Ind. 1998).

In this case, Petitioner's counsel challenged nineteen jurors for cause. Seventeen of those challenges were successful (R. 1871; 1901-02, 1902, 1907-08; 1987; 2105, 2107; 2124-2310; 2135-2147; 2339-2340; 2349, 2350; 2469; 2473; 2492; 2497, 2500; 2574, 2577; 2670, 2674; 2800-01; 2822; 3285; 3432; 3484). Petitioner's trial counsel also attempted to rehabilitate ten jurors who the State moved to strike for cause (R. 1666-1680; 1969-1973; 2897-2910; 2547-2551; 2953-2956; 2265-2277; 2746-2752; 2752-2760, 3582-3587; 3587-3590). Most of these jurors had inclinations against capital punishment. On four occasions, Petitioner's trial counsel successfully rehabilitated these jurors (R. 1969-1973; 2752-2760; 3582-3587; 3587-3590), forcing the State to exercise its peremptory challenges.

As to claim 9(A)(14), Petitioner's trial counsel used 17 of their 20 peremptory strikes (R. 3473). Baldwin stated that the only reason he and Clutter would not have exhausted their peremptory challenges was that "what was coming up was worse" (Petitioner's Exhibit 24, p. 44, line 4). At trial, Petitioner's trial counsel stated they were using their peremptory challenges knowing "what we had coming" (R. 2437). Counsel's assessment of "what was coming up" was reasonable given that Baldwin spent over 30 hours reviewing juror questionnaires (Respondent's Exhibit D , line items dated January 14, 16, 21, 22, 23, 25, 31, 1995; February 2, 4, 1995) and Clutter spent 20.5 hours (Respondent's Exhibits A, B, line items dated January 7, 9, 11, 12, 16, 17, 20, 23, 30, 1995). Because the failure to use the remaining peremptory challenges was a matter of trial strategy, this court finds that counsel were not ineffective during voir dire.

Claim 9(A) 16: Defense counsel were not ineffective for providing legal advice that enabled Petitioner's confession to be admitted as evidence. During the State's case-in-chief, the prosecuting attorney sought to admit a redacted copy of Petitioner's confession as evidence (R. 3937). When the prosecutor mentioned that the certain "inadmissible" material had been removed from the videotape, Baldwin objected and moved for a mistrial (R. 3940). Baldwin argued that the prosecutor's comment violated the motion in limine, and that an admonishment would be insufficient to cure the error (R. 3939-40). In addition, Baldwin characterized the prosecutor's statement as prosecutorial misconduct, and provided a citation to the Rules of Professional Responsibility (R. 3940, 3944). After the trial court denied the motion for mistrial and indicated that it would admonish the jury, the prosecutor inquired of the trial court how he was to establish a foundation for the admission of the confession without asking the witness if the redacted videotape was a true and accurate copy of the original (R. 3946). Baldwin responded by stating that the prosecutor should ask if the witness has seen the video, and if so, whether it is a true and accurate depiction of what it represents (R. 3946). Petitioner's current counsel characterize this as "legal advice" that enabled the confession to be admitted. This claim lacks merit. Baldwin vigorously fought the admission of the videotape, making a motion for mistrial as well as a claim of prosecutorial misconduct. As Baldwin explained during post-conviction proceedings, his instructions to the prosecutor were not designed to help the State enter the confession as evidence; they were designed to prevent the jury from hearing anything else about evidence excised from the videotape. This does not constitute ineffective assistance of counsel.

Claim 9(A)(17): This Court finds that defense counsel were not ineffective for failing to make a second motion

for change of venue due to pretrial publicity. Petitioner's trial was moved from Putnam County to Tippecanoe County due to pretrial publicity in Putnam County (R. 193). Baldwin described newspaper coverage in Putnam County as "probably the biggest thing to hit Putnam County since they had newspapers" (Baldwin 11). Tippecanoe County, however, is in a different media market than Putnam County (Baldwin 13). Putnam County is in the Indianapolis television coverage area, while Tippecanoe County has its own network affiliates, television station, and its own local news (Baldwin 13). While there was newspaper coverage of the trial, some of it fairly extensive, it was "not necessarily front page like it was in Greencastle" (Baldwin 14). Defense counsel were not ineffective for failing to seek another change of venue. Individual jurors were sequestered immediately after being selected at the request of Petitioner's counsel. The facts of Petitioner's crime were inherently newsworthy, and there would likely have been a certain amount of news coverage anywhere this case was tried. Therefore, Petitioner's trial attorneys did not engage in deficient performance for failing to make a second motion for change of venue.

Nor can Petitioner show prejudice based on his attorney's failure to make an additional motion for change of venue. While a panel of potential jurors was struck when one member of the venire brought in newspaper articles to share with her fellow veniremen, the jurors were carefully vetted during voir dire for any exposure to pretrial publicity. Indeed, every panel of the venire was carefully questioned about pretrial publicity by the court, the State, and by Petitioner's counsel (T. 1579-3690). Moreover, several jurors were called as witnesses during post-conviction proceedings and were never asked about their exposure to any pretrial publicity (T. 74-88). Thus, Petitioner has failed to show any prejudice resulting from

his attorneys decision not to move for a second change of venue. Petitioner received effective assistance of counsel.

Claim 9(A)(18): This Court finds that defense counsel were not ineffective for litigating their fee payments. Clutter and Baldwin both testified that they disagreed with Putnam County Judge LaViolette approval of some of their bills (T. 415-16; Baldwin 7-9). The relationship was variously described as "antagonistic" or "difficult" (Baldwin 7; T. 416). Although both attorneys objected to the time needed to resolve the billing disputes, both agreed that the disputes did not prevent them from taking any particular step or cause them to forgo any particular part of their defense (T. 416, 437; Baldwin 80). Petitioner's case was venued to Tippecanoe County in February 1994 (R. 193). After Petitioner's case was moved to Tippecanoe County, Clutter testified that there was "absolutely" an improvement regarding billing procedures (T. 437).

It is well-settled that a reviewing court need not determine whether counsel's performance was deficient before examining the prejudice suffered as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Here, because Petitioner has shown no prejudice, his claim of ineffective assistance of counsel fails.

Claim 9(A)(20): Defense counsel were not ineffective for failing to tender an instruction explaining the meaning of life imprisonment without parole. The trial court's instructions explained to the jury that they could recommend that Petitioner receive a sentence of "life imprisonment without parole" (R. 944-45, 948, 954). It is a fundamental rule of jury instructions that words that are understood by persons of average intelligence, experience,

and education need not be defined or explained by the trial court. *Martin v. State*, 262 Ind. 232, 246, 314 N.E.2d 60, 70 (Ind. 1974); *Fuller v. State*, 261 Ind. 376, 381, 304 N.E.2d 305, 309 (Ind. 1973). The Supreme Court has made the following observations in upholding a trial court's refusal to give instructions defining the terms "malice" and "in a sudden heat":

> Terms used in instructions should be defined by the court where they have a technical meaning, or may be misapplied by the jury; but where the terms are in common use and are such as can be understood by a person of ordinary intelligence they need not be defined or explained in the absence of anything in the charge to obscure their meaning. *McFarland v. State*, 390 N.E.2d 989, 994 (Ind. 1979).

In McFarland, the Supreme Court established the rule of law that terms that have technical meanings or special legal definitions should be defined or explained, but those terms need not be defined or explained if they are in "common use and are such as can be understood by a person of ordinary intelligence." *McFarland*, 390 N.E.2d at 994. The terms "malice" and "in a sudden heat" undoubtedly have what the Supreme Court called "special legal definitions." *See, Drollinger v. State*, 408 N.E.2d 1228, 1243 (Ind. 1980) ("malice"); *Kincaid v. State* (1976), 265 Ind. 345, 352, 354 N.E.2d 199, 204 (Ind. 1976) ("malice"); *Holloway v. State*, 170 Ind.App. 155, 159, 352 N.E.2d 523, 526 (Ind. 1976)("sudden heat"). Nevertheless, those words were not required by the Supreme Court in *McFarland* to have been the subject of definitional instructions because the jury applied the common sense understanding of the words, which understanding coincided with the "special legal definitions" ascribed to those words under Indiana law.

Not only is it unnecessary to instruct the jury on words that are commonly understood; to do so risks reversible error. In Jenkins v. State, 424 N.E.2d 1002 (Ind. 1981), the jury, after deliberating for several hours, asked the trial court to define the words "sexual gratification" as used in an instruction predicated upon the offense of criminal deviate conduct, defined as "an act of sexual gratification involving a sex organ of one person and the mouth or anus of another person." In response to the jury's request for a definitional instruction upon the words "sexual gratification," the trial court in *Jenkins* modified the original criminal deviate conduct instruction by adding the two additional sentences to the instruction: "Sexual gratification may or may not include ejaculation" and "Webster defines gratification as a source of gratification or pleasure." *Id.* at 1003. The Supreme Court held that the trial court's modification of the original instruction constituted judicial interference with the deliberation process of the jury. The Court observed that "[The original instruction] utilized the term 'sexual gratification' from the statute establishing the offense of criminal deviate conduct. The term has no special legal meaning as used in the statute, but is used in its ordinary sense. A jury of twelve would discern its meaning upon fair and open deliberation. There is no rule of law requiring the judge to instruct juries regarding the meaning of such common terms..." *Id.* at 1004.

The phrase "life without the possibility of parole" consists of common words that may be easily understood by persons of average understanding. Thus, defense counsel were not ineffective for failing to tender an instruction that would define this term. On the contrary, had such an instruction been tendered, it would have been refused. Petitioner received effective assistance of counsel.

Claim 9(A)(21): Defense counsel was not ineffective for failing to move for a mistrial after becoming aware the

jury had observed Petitioner in shackles because there is no evidence that the jury observed Petitioner in shackles. Juror Wagner testified that he never observed Petitioner in shackles, although he stated that he may have seen him shackled on television after the trial (T. 80). Juror Hahn testified that she never saw Petitioner wearing handcuffs or shackles (T. 82). Juror Stinson testified that she did not remember seeing Petitioner shackled during trial (T. 85). Juror Gant testified that he did not see Petitioner in handcuffs (T. 88). Juror Vandervate testified that she thought she observed officers starting to handcuff Petitioner, but she was not sure (T. 75). Vandervate also testified that she was not sure whether this was before or after the verdict (T. 76). Because none of the jurors saw Petitioner in handcuffs or shackles during trial, Petitioner's defense attorneys were not ineffective for failing to make a motion for mistrial with no basis.

Claim 9(A)(22) Defense counsel were not ineffective for failing to object purportedly improper "victim impact evidence," including a photograph of the victim in this case, the prosecutor's opening statement, the testimony of Toni Butcher, and the testimony of Todd Snider. Baldwin testified that he believed that the State's use of the victim's picture was somewhat repetitive (Baldwin 47). However, Baldwin also explained that it was sometimes prudent not to object to evidence because doing so would draw more attention to the evidence (Baldwin 99). Defense counsel's decision not to object to the admission of the victim's photograph, the prosecutor's opening statement, and the testimony of Todd Snider and Toni Butcher that related to the photograph was a reasonable decision not to draw the jury's attention to this testimony. In any event, Petitioner suffered no prejudice from defense counsel's decision not to object to this evidence.

Claim 9(A)(24) Trial counsel was not ineffective for not objecting to Petitioner wearing the stun belt. Petitioner has not proved that the belt impeded his ability to assist counsel. At most Petitioner experienced some discomfort while wearing the belt at one point, and this discomfort was alleviated at the next recess (T. 435). Petitioner has not presented evidence that the stun belt made him unable to assist his attorneys. Nor did the belt affect Petitioner's appearance before the jury: all the jurors testified that they did not know that Petitioner was wearing a stun belt (T. 74-89). Defense counsel were not ineffective for failing to raise this meritless claim.

Claim 9(A)(25): Defense counsel were not ineffective for failing to investigate and prepare evidence of organic and mental impairments, including dissociative disorders, borderline personality disorders and the effects of long term drug use. Defense counsel's investigation of Petitioner's mental health and prior use of drugs was reasonable, as set forth more fully under Claim 9(A)(2), above. Both Baldwin and Clutter testified that they were aware of Petitioner's prior drug abuse (Baldwin 65-66; T. 432). Dr. Lennon was also aware of Petitioner's prior drug abuse (T. 432). However, Petitioner denied having recently used drugs: he "used to do drugs, used to drink," but that he stopped drinking when he got arrested for child molesting, and "had stopped smoking marijuana awhile before that, long before that, pretty much cause my sister got killed by a guy that was high and ever since then I had, I had gone from doing it heavy to real light and then stopped" (R. 1217). Moreover addiction counselor Needham evaluated Petitioner in January 1993 and found that Petitioner did not have a drug or alcohol problem (R. 4666, 4678-79). Thus, defense counsel's investigation was reasonable.

Moreover, had defense counsel adopted the strategy of emphasizing Petitioner's prior drug use, this would have been inconsistent with their mitigation strategy of portraying Petitioner as the passive victim of abuse. As Dr. Lennon testified, "so much of [Petitioner's] behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and then you look at all the drugs that he's been surrounded with with his birth mother; and then the fact that she probably – even though she denies it, the evidence will suggest that she probably did do drugs or alcohol during pregnancy" (R. 5319). Had defense counsel elicited evidence of Petitioner's prior use of illicit drugs, he would no longer appear to be a passive victim molded by outside forces, but would appear as someone who had actively decided to break the law. As the Seventh Circuit explained in *Stewart v. Gramley*, 74 F.3d 132, 136 (7th Cir. 1996), "What is brought out [during the penalty phase] that will help [a defendant] is what goes to show that he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime." Defense counsel was not ineffective for failing to pursue a mitigation strategy that could have caused the jury to think that Petitioner had a more extensive history of lawbreaking than was otherwise apparent.

Claim 9(A)(26): Defense counsel ensured that they were fully apprised of all relevant and material information secured by the defense team. Mitigation specialist Knoy testified that she relayed all information that she discovered to the attorneys (T. 18-19). Baldwin testified that he and Clutter routinely discussed all aspects of trial and preparations (T. 63-64). This claim is without merit.

Claim 9(A)(27): As set forth more fully below, claims 8-9(D), 8-9(E), and 8-9(H) are without merit. Therefore, Petitioner's trial counsel were not ineffective for failing to present these claims.

Claims 8(B), 9(B) – Ineffective assistance of appellate counsel

Petitioner next raises numerous allegations of ineffective assistance of appellate counsel. This Court finds that all of Petitioner's claims are without merit.

The Court incorporates the standards set forth above as applicable to addressing Petitioner's claims of ineffective assistance of counsel generally. To establish ineffective assistance of appellate counsel, a petitioner must prove both that his appellate counsel's performance was deficient and that counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Appellate counsel is not required to raise every nonfrivolous issue that presents itself for appeal; rather, counsel is entitled to, and should, select for argument the strongest issues and omit the rest. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *see Bieghler*, 690 N.E.2d at 193-94. In construing a claim of ineffective assistance counsel based on appellate counsel's failure to raise viable issues on appeal, the reviewing court must determine whether appellate counsel failed to present a significant and obvious issue on appeal. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Significant issues that could have been raised should be compared to those issues that were raised. *Gray*, 800 F.2d at 646. Only when the ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome. 800 F.2d at 646. The ultimate question is "whether, but for counsel's errors, there is a reasonable probability that the outcome of

the proceeding [here, Petitioner's direct appeal] would have been different."

The supreme court has recognized three types of ineffective assistance of appellate counsel claims, namely, (1) counsel denied the defendant access to appeal; (2) counsel waived issues; and (3) counsel failed to present issues well. *Bieghler*, 690 N.E.2d at 193-95. The first category is inapplicable here. The second category will lead to a finding of deficient performance only when the reviewing court determines that the omitted issues were significant, obvious and "clearly stronger than those presented." 690 N.E.2d at 194 (quoting *Gray*, 800 F.2d at 646). Appellate counsel is rarely found ineffective on this basis; "the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Bieghler*, 690 N.E.2d at 193-94.

The third category applies when counsel is alleged to have raised particular issues but did not raise them well. *Id.* at 195. In that context, a reviewing court may still able to reach the issue on its merits. *See, e.g., Ingram v. State*, 508 N.E.2d 805,808 (Ind. 1987). This third category of claims presents the greatest challenge for petitioners in that it requires the reviewing tribunal to re-examine specific issues it has already adjudicated to determine whether the new record citations, case references, or arguments would have had any marginal effect on their previous decision. Thus, this kind of ineffectiveness claim, as compared to the others mentioned, most implicates concerns of finality, judicial economy, and repose while least affecting assurance of a valid conviction. For these reasons, this third category of ineffective assistance of appellate counsel is the most unlikely to result in a finding of deficient performance. *Bieghler*, 690 N.E.2d at 195. Because judicial scrutiny of counsel's performance is already highly deferential, *Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind.

1995), and a "less than stellar" presentation of an issue does not prevent the reviewing court from reaching the merits of an issue, "[r]elief is only appropriate when the appellate court is confident it would have ruled differently." *Bieghler*, 690 N.E.2d at 196.

Based on those standards, Petitioner fails to establish that his appellate counsel acted in a manner that was objectively unreasonable or that rendered his appeal fundamentally unreliable.

First, Petitioner simply cannot establish that the acts and omissions alleged, even if objectively unreasonable, rendered the appeal unreliable. While the appeal was unsuccessful, none of the issues now offered as incorrectly omitted are so clearly stronger than those raised as to warrant a different result. Indeed, Petitioner does not even allege as much, let alone offer the required comparative analysis to warrant relief.

Claim 9(B)(1): Petitioner's appellate counsel were not ineffective for failing to raise the issue that Petitioner's death sentence was unfair because of a "doubling" of aggravating factors relating to Zachary's age. Indeed, Petitioner's appellate counsel raised this issue on appeal; it was considered and rejected by the Supreme Court. *See Stevens*, 691 N.E.2d 412, 433 (Ind. 1997). When this Court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding its review in post-conviction proceedings. *Lowery v. State*, 640 N.E.2d 1031, 1037 (Ind. 1994) Therefore, this issue is *res judicata*, and Petitioner is entitled to no relief.

Claim 9(B)(2): Appellate counsel were not ineffective for failing to argue that the sentence was unreliable because jury's sense of personal responsibility was reduced. There is no evidence in the record that the jury's sense of personal responsibility was reduced, nor was such

evidence produced at the post-conviction hearing. Nor has Petitioner shown that this issue was of greater merit than the issues actually raised on appeal. Therefore, this claim fails.

Claim 9(B)(3): Appellate counsel were not ineffective for failing to address the claim that Petitioner' trial was unfair because of the admission of evidence prohibited by Indiana Evidence Rule 404(B). Indeed, appellate counsel did raise this issue on appeal, and the Supreme Court rejected it. *See Stevens*, 691 N.E.2d at 435. Therefore, this claim is barred by *res judicata*. *Lowery*, 640 N.E.2d at 1037.

Claim 9(B)(5): Appellate counsel were not ineffective for failing to include a copy of the presentence report in the appellate record. The Brief of Appellant filed by Petitioner's counsel in this case was 140 pages long and raised numerous issues. None of these issues depended on the presentence report. Petitioner has failed to identify any meritorious issue based on the content of the presentence report. Thus, Petitioner's appellate counsel properly complied with Indiana Appellate Rule 7.2(B), which provides that "Neither party shall request parts of the record or a transcript of the proceedings which are not needed for the issues to be asserted upon the appeal." Petitioner' appellate counsel complied with applicable appellate rules, and Petitioner can show no prejudice based on appellate counsel's failure to include the report in the record of proceedings. In any event, the appellate rules also provide that parts of the record "which are not transmitted to the court on appeal shall nevertheless be a part of the record on appeal for all purposes," and expressly permit the reviewing court to obtain other parts of the record from the lower court. Ind. App. Rule 7.2(B). Petitioner's appellate counsel were not ineffective for failing to include a copy of the presentence report in the record of proceedings.

Claim 8(C), 9(C) – Petitioner's Right to Testify

Claim 9(C): Petitioner was not denied his constitutional right to testify on his own behalf based on the recommendation of defense counsel that he not take the stand during the guilt phase. This claim has been abandoned because Petitioner presented no evidence at the post-conviction hearing that he wanted to testify. Moreover, as set forth more fully in Claim 9(A)(11), trial counsel's recommendation that Petitioner not testify was reasonable and based on sound trial strategy. This claim is without merit.

Claims 8(D), 9(D) – Interference by the State

In evaluating a claim of prosecutorial misconduct, this Court must determine "whether the prosecutor engaged in misconduct and then whether under all of the circumstances the prosecutor's misconduct placed the defendant in a position of grave peril to which he should not have been subjected." *Wright*, 690 N.E.2d 1098. The gravity of the peril depends on the probable effect of the misconduct on the jury, not the degree of impropriety. *Charlton*, 702 N.E.2d at 1051. If counsel was not ineffective for failing to object to an act of alleged prosecutorial misconduct, the conduct cannot support a claim of prosecutorial misconduct. *See id.*.

Preliminarily, this Court finds that Petitioner's claims of prosecutorial misconduct are doubly waived. First, Petitioner waived any error at the post-conviction level because he did not raise this issue during his direct appeal. *Baird v. State*, 688 N.E.2d 911, 917; *see also Minnick*, 698 N.E.2d at 751 (Because these [four claims of alleged misconduct] were available on direct appeal but were not raised, the defendant's claims of prosecutorial misconduct are forfeited."). Second, Petitioner did not raise this issue during his trial, and the trial court had no opportunity to

address any error or misconduct that may have occurred. The failure to object to the prosecutor's conduct constitutes waiver of both this claim. *Wright v. State*, 690 N.E.2d 1098, 1111 (Ind. 1997).

Furthermore, Petitioner is not entitled to relief on these claims even if he had not waived them. The alleged acts of misconduct were not improper, did not put Petitioner in grave peril if they were, and any misconduct is harmless under the facts of this case.

Claim 9(D)(1): Petitioner has waived his claim that the trial court improperly denied motions to strike jurors for cause because this claim was available and not presented on direct appeal *Baird*, 688 N.E.2d at 917. Waiver notwithstanding, this court notes that Petitioner only used 17 of his 20 peremptory strikes (R. 3473). Thus, any error in denying Petitioner's motions to strike is harmless, as defense counsel were able to use there peremptory strikes to obtain an acceptable jury.

Claim 9(D)(2): Petitioner has waived his claim that the trial court improperly permitted the jury to hear purportedly improper victim impact evidence has been waived because this claim was available and not presented on direct appeal. *Baird*, 688 N.E.2d at 917.

Claim 9(D)(3): The State did not commit misconduct by introducing evidence purportedly barred by Indiana Evidence Rule 404(b). This claim is barred by *res judicata* because the Supreme Court found on direct appeal that this evidence was "obviously relevant" and that Petitioner himself "opened the door" to this testimony by eliciting testimony regarding his non-violent and law abiding character. *Stevens*, 691 N.E.2d at 435. This claim is without merit.

Claim 9(D)(4): The State did not commit misconduct by purportedly taking inconsistent positions to avoid the

corpus delicti rule. This claim is barred by *res judicata* because the Supreme Court specifically found no violation of the *corpus delicti* rule on direct appeal. *Stevens*, 691 N.E.2d at 425. The court finds that this claim is without merit.

Claim 9(D)(5): Judge LaViolette's billing procedures did not prejudice counsel's ability to prepare their case. As set forth more fully in Claim 9(A)(18), above, litigation over fee disputes did not prejudice defense counsel's ability to prepare for trial. Moreover, while it is important for appointed counsel in capital cases to be paid in a complete and timely manner, Indiana Criminal Rule 24(C) also requires that the trial court examine and evaluate the bills submitted by appointed counsel. This claim is without merit.

Claim 9(D)(6): The State did not commit misconduct by shackling Petitioner. As set forth more fully in Claim 9(A)(21), the jury did not see Petitioner in shackles.

Claim 9(D)(7): The State did not commit misconduct by denying defense attempts to obtain *ex parte* hearings concerning the need for expert witness funds. This claim has been waived because it was available on direct appeal and was not presented to the Supreme Court. *See Baird*, 688 N.E.2d at 917; *see also Minnick*, 698 N.E.2d at 751 (Because these [four claims of alleged misconduct] were available on direct appeal but were not raised, the defendant's claims of prosecutorial misconduct are forfeited."). Moreover, Petitioner did not raise this issue during his trial, and the trial court had no opportunity to address any error or misconduct that may have occurred. The failure to object to the conduct constitutes waiver of both this claim. *Wright*, 690 N.E.2d at 1111. Moreover, the trial court did not deny defense counsel's requests for *ex parte* hearings, but merely informed counsel that they must show good cause before an *ex parte* hearing would be granted. This is in accordance with Indiana law. *See*

Hough, 560 N.E.2d at 516. Defense requests for funds were granted *ex parte*.

On May 23, 1994 trial counsel obtained an authorization to employ a licensed psychologist. The name of the expert was not designated in the order. Detailed billings were to be submitted for approval prior to payment which billings were ordered sealed. On the same date trial counsel asked for an investigator to assist with the case, which motion was granted and funds authorized. Detailed billings were to be submitted to the Court prior to payment. The petition for investigator fees was ordered seal. On June 20, 1994 trial counsel for defendant filed a petition for additional funds for mitigation investigation. The proposed order submitted was entered and the additional funds approved.

On July 22, 1994 additional funds were allocated and approved for Doctor Lennon for testing and an evaluation for the defense. Petitioner has not identified anywhere in the record where any request for funds to hire experts was denied after the motion for change of venue was granted. The Petitioner has not identified anywhere in the record where trial counsel's thought process and strategies were required to be disclosed prior to the approval of funds for expert witnesses.

On September 1, 1994 a petition for expert fees was filed. The order approving those fees was sealed and has remained under seal along with other orders of payment for counsel fees and expenses.

On January 17, 1995 trial counsel petitioned the Court for additional funds for mitigation investigation. Additional funds were authorized on January 18, 1995.

Claim 9(D)(8): The State did not commit misconduct by denying Petitioner's motions for mistrial. This claim

has been waived because it was available on direct appeal and was not presented to the Supreme Court. *See Baird*, 688 N.E.2d at 917.

Claim 9(D)(9): The trial court did not commit reversible error by permitting Petitioner to wear a stun belt. Generally, a defendant is not to appear before the jury in restraints. *Bivins v. State*, 642 N.E.2d 928, 936 (Ind. 1994) (quoting *Evans v. State*, 571 N.E.2d 123, 1238 (Ind. 1991)). However, the trial court in its discretion, may have the defendant restrained to prevent escape, protect people in the courtroom, and maintain ordering during the trial. *Id.* The trial court should hold a hearing to determine whether restraint is necessary. *See Evans*, 571 N.E.2d at 1238; *Elswick v. State*, 565 N.E.2d 1123, 1127 (Ind. Ct. App. 1991). Even if the trial court fails to make a record on the need for restraint, the use can be deemed harmless error. *See Trotter v. State*, 559 N.E.2d 585, 589 (Ind. 1990).

Petitioner has waived review of the decision that he wear the belt during trial by not preserving the issue for appeal. Though the use of the belt does not appear in the direct appeal record, both Baldwin and Clutter knew that Petitioner was wearing the belt and chose not to object.

Waiver notwithstanding, Petitioner is not entitled to have his convictions or sentence overturned because he had to wear the belt. The trial court did not strip the presumption of innocence from Petitioner by requiring him to wear the belt. The purpose of the belt is to maintain control over a prisoner *without* the prisoner appearing restrained. Petitioner did not prove that the belt was visible or that the jury knew about it. Indeed, the jurors uniformly testified that they did not know that Petitioner was wearing a stun belt (T. 74-89). Because Petitioner did not *appear* restrained during the trial, he was not stripped of the presumption of innocence. *See Bivins*, 642 N.E.2d at 936.

The trial court's failure to make a record on the need for the restraint was, at most, harmless error. *Trotter*, 559 N.E.2d at 588-89. The belt was not visible. The belt did not restrain the Petitioner unless activated; and it was never activated while he wore it. Furthermore, the jury knew that Petitioner was charged with the murder of a child and had been incarcerated at the time of the crime. Also, the evidence of Petitioner's guilt was overwhelming.

Claim 9(D)(10): The State did not improperly interfere with the defense team's investigation by opposing the funds for a mitigation investigator and opposing *ex parte* determination of requests for defense funds. This claim has been waived because it was available and not presented on direct appeal. *See Baird*, 688 N.E.2d at 917. The record does not reflect that the State's objections were made for an improper purpose, nor was any such evidence presented at the hearing. To the extent that this claim has not been waived, it is without merit.

Claims 8(E), 9(E) – sentencing evidence

Claim 9(E)(1): Petitioner's sentence was not unreliable due to the trial court's reliance on Petitioner's confession. This claim has been waived because it was available on direct appeal and was not presented to the Supreme Court. *See Baird*, 688 N.E.2d at 917. Waiver notwithstanding, this claim is without merit as set forth more fully in Claim 9(A)(5).

Claim 9(E)(2): Petitioner has abandoned his claim that the trial court improperly relied upon Petitioner's conversation with Tracy Eastin by failing to present any evidence at the hearing.

Claim 9(E)(3): Petitioner's claim that his sentencing was unfair because the jury and trial court were unaware

of purported organic and mental impairments is without merit for the reasons set forth in Claim 9(A)(2).

Claim 9(E)(4): Petitioner's claim that the jury's assessment of Petitioner was affected by the fact that his demeanor was altered because he wore a stun belt lacks merit. The jurors testified that Petitioner's demeanor at trial was similar to Petitioner's demeanor during the videotaped confession (T. 74-89). Because Petitioner was not wearing a stun belt when he gave his confession, the court finds that the stun belt did not affect Petitioner's demeanor.

Claims 8(F), 9(F) - lethal injection

Petitioner claims that his capital sentence is infirm because lethal injection fails to provide adequately trained medical personnel, fails to ensure that the convict is unconscious when injected, does not provide the convict with the presence of counsel during the execution, deprives condemned inmates of notice, and is cruel and unusual. This claim is not cognizable for post-conviction review and is also barred by waiver and without merit.

Petitioner's challenge to Indiana's method of execution does not state a claim for which relief may be granted on post-conviction review. Specifically, post-conviction relief is available only to those who demonstrate invalidity in their convictions or sentences. *See* Ind. Post-Conviction Rule 1(l). The rules provide "a remedial avenue for attacking the validity of. . .[the]. . .conviction or sentence." *Day*, 320 N.E.2d at 829 (emphasis in original). A court lacks the jurisdiction under the post-conviction rules to entertain complaints that the policies and procedures of the Department of Correction are unconstitutional. *See Day*, 320 N.E.2d at 829; *accord Jefferson v. State*, 399 N.E.2d 816, 826-27 (Ind. Ct. App. 1980) (where inmate does not challenge the legality of

custody but only the conditions of detention, writ of mandamus or civil rights action is the appropriate remedy, not raising complaint in direct appeal of the criminal conviction). Petitioner's claim on lethal injection as the method of execution cannot serve as a ground for relief because "[i]t bears solely on the legality of the execution of sentence and not on the validity of the sentence itself." *People v. Bradford*, 929 P.2d 544, 578 (Cal. 1997) (quoting *People v. Berryman*, 864 P.2d 40, 80 (Cal. 1993)).

Petitioner's claim is also barred by waiver. The legislature changed the method of execution to lethal injection before Petitioner filed his direct appeal brief. Although Petitioner raised several constitutional challenges to the death penalty, Petitioner failed to raise this available claim on direct appeal. *See Stevens*, 691 N.E.2d at 427-437. Alternatively, the claim is barred by *res judicata* to the extent that the Supreme Court of Indiana generally addressed the propriety of Petitioner's capital sentence on direct appeal and found it proper. *Stevens*, 691 N.E.2d at 437 ("we determine that the death penalty is appropriate under the code and the constitutions and adequately reflects the nature of the offense and offender").

Notwithstanding those three bars to review of this claim, it is difficult to discern how Petitioner is denied notice of the procedure given the facts that (1) the legislature has expressly provided that lethal injection is the mode of execution, *see* Indiana Code § 35-38-6-1; and (2) Petitioner has produced Parke's testimony that outlines the procedure in great detail. As recounted above in the factual findings, Petitioner obviously has access to Parke's testimony, and therefore, Petitioner has actual notice of precisely what procedures will be employed at his execution.

Moreover, a claim that lethal injection violates the Eighth Amendment claim would be unavailing. State and

federal courts around the nation have uniformly held that execution by lethal injection does not involve the unnecessary and wanton infliction of pain, comports with current societal norms and, therefore, does not violate the constitutional prohibition against cruel and unusual punishment. *See e.g., Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997); *Dawson v. State*, 673 A.2d 1186 (Del. 1996); *State v. Hinchey*, 890 P.2d 602 (Ariz. 1995); *Hopkinson v. State*, 798 P.2d 1186 (Wyo. 1990); *State v. Moen*, 786 P.2d 111 (Ore. 1990). Courts have rejected precisely the type of claims that Petitioner asserts here. *See Ex Parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978). Cases similarly decided include: *People v. Stewart*, 520 N.E.2d 348, 357-58 (III. 1988), *cert. denied*, 488 U.S. 900 (1988), *reh'g denied*, 488 U.S. 987 (rejecting claim that state law did not provide sufficient guidelines and procedures to guard against a tortuous death); *People v. Stewart* 528 N.E.2d 631, 639 (III. 1988), *cert. denied*, 489 U.S. 1072 (1989), *reh'g denied*, 490 U.S. 1042 (1989) (rejecting claim that "execution must be stayed until department of correction adopts standards and procedures governing the manner and method of execution by lethal injection"); *State v. Deputy*, 644 A.2d 411, 420-21 (Del. 1994) (rejecting claim that the lack of a detailed protocol concerning selection and training of personnel administering lethal injection rendered a method of execution unconstitutional; instead, the court noted that there is no requirement that a statute specify detailed procedures for administration of the death penalty and noted that the department of correction's own procedures were conventional and well-planned); and *LaGrand v. Lewis*, 883 F. Supp. 469, 470 (D. Ariz. 1995) (the lack of written instructions prescribing level of training for personnel carrying out execution and the lack of specificity in execution protocol does not result in a constitutional violation). Petitioner is entitled to no relief on this claim.

Claims 8(G), 9(G) - post-appellate procedures unfair

Petitioner's final claim challenges the adequacy of Indiana's state post-conviction review of capital sentences and the underlying convictions. Specifically, Petitioner decries the Indiana Supreme Court's control over the timing of such proceedings and the scheduling of hearing and decisions on those proceedings. Petitioner also challenges the standard of review for state post-conviction actions and asserts that the state supreme court is inclined to affirm the denial of state post-conviction relief. Petitioner's claims are not cognizable and do not merit relief. This Court does not sit as a reviewing court over the state supreme court's rule making authority. Further, Petitioner states no allegation within this claim that alleges a cognizable claim or error related to the disposition of this case. Indeed, Petitioner's apparent frustration with the state supreme court's review of capital cases aside, he states no allegation establishing that he will not get a fair and adequate post-conviction review by this Court or by the supreme court in this case.

Incorporation of Findings

All conclusions of law that are more appropriately findings of fact are now deemed findings of fact, and all findings of fact that are more appropriately conclusions of law are deemed conclusions of law.

Judgment

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petition for post-conviction relief is DENIED.

SO ORDERED, ADJUDGED AND DECREED this <<written>> 14th day of September, 1999.

/s/ George J. Held
George J. Heid
Judge, Superior Court No. 2
of Tippecanoe County

ATTORNEYS FOR APPELLANT
Brent Westerfeld
Indianapolis, Indiana

Jeffrey A. Baldwin
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE
Jeffrey Modisett
Attorney General of Indiana

Geoff Davis
Deputy Attorney General
Indianapolis, Indiana
Indianapolis, Indiana

In The
INDIANA SUPREME COURT

CHRISTOPHER M. STEVENS,	)	
Appellant (Defendant Below),	)	
	)	
v.	)	No. 79S00-9507
STATE OF INDIANA,	)	-DP-828
Appellee (Plaintiff Below).	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable George J. Heid, Judge
Cause No. 79D02-0402-CF-24

On Direct Appeal

December 31, 1997

SHEPARD, Chief Justice.

Christopher M. Stevens was tried before a jury and convicted of murdering ten-year-old Zachary Snider. The jury recommended death. The trial judge found that the State had proved three aggravating circumstances and that these outweighed the mitigating circumstances. He sentenced Stevens to death. We affirm.

Facts

On February 17, 1993, the Marion Superior Court, after a jury trial, sentenced Christopher Stevens to four years for child molestation, with one year executed and three years suspended to probation. Stevens was released from the Marion County jail on probation in May 1993, and went to live at the home of his father in Stardust Hills, a subdivision located in Cloverdale, Indiana. On the night before he was released, Tracy Easton, a fellow inmate also incarcerated for child molesting, told Stevens he would be back in jail in two months. Stevens replied, "No, I won't. Next time I'll kill him." (R. at 4587-88.)

Zachary Snider lived with his parents and sister, also in Stardust Hills, about one-quarter mile from Stevens. During the early summer of 1993, Stevens attended at least one of Zachary's Little League baseball games, videotaped it, and offered money to anyone on the team who could hit a home run. On one afternoon in mid-June, Stevens and Zachary asked for and received Zachary's father's permission to go fishing. A little later, when Mr. Snider realized that the two were not at the pond located within Stardust Hills, he went looking for them. Upon finding them at a pond located outside of the subdivision, Zachary's father informed them both that Zachary was not to be in Stevens's car and that Stevens was to stay away from his son.

On July 15, 1993, Zachary left home about 11 a.m. and rode his bike to the home of his playmates, Alex and Andrew Krouse. They lived across the street from Stevens. At about 1:30 p.m., Zachary phoned his father to say he was then at the Krouse's but would soon be coming home. According to Alex Krouse, Zachary looked across the street at Stevens' house before he departed and said, "Good, Chris is home," and that he was going over there. (R. at 4102-03.) As Zachary rode down Krouse's driveway, Krouse went back into his house. A few minutes later, as Krouse and his mother left their home by car, Krouse noticed Zachary's bike parked in Stevens' yard.

According to Zachary's father, Zachary arrived home at approximately 2:30 p.m. The boy spoke to his father for a few minutes in their garage, gave his father some mowing money he had collected on his way home, and then went inside. Shortly thereafter Mr. Snider went inside to look for Zachary, but the boy had already left on his bicycle.

Later that afternoon Mark White, Stevens' fifteen-year-old neighbor, received a call from Stevens asking for White's immediate assistance in pushing a trailer back into Stevens' garage. White went over and helped Stevens, and then returned to his own home.

When Zachary did not arrive home at dinner time, which was around 7 p.m., the Sniders began searching the neighborhood. After a while they engaged the help of Alex and Andrew Krouse's parents, the Rumleys. During this search, the Rumleys encountered Stevens in front of his house. When asked, Stevens informed them that he had been asleep until 3:00 or 3:30 p.m. and had not seen Zachary all day. Finally, at 9 p.m. Mr. Snider called the police. At about 9:15 p.m., Stevens arrived at the Sniders' home, "made reference to having seen the police and wanted to know what was going on." (R. at 4169.) Stevens

left soon after, but came and went to the Sniders' residence numerous times that evening, the final visit being around midnight. The next morning Stevens again showed up at the Sniders' home and inquired about their search for Zachary. He requested some of the flyers that Mr. Snider had printed up the previous evening for distribution. That day, Stevens and fifteen-year-old Jason Byrns, another resident of Stardust Hills, drove around searching for Zachary and passing out Snider's flyers. At one point during the trip Stevens said to Byrns, "I wonder where Zachary can be?" (R. at 4222.)

By July 17, several hundred people, including police officers from various agencies, members of the volunteer fire department, and civilians, were engaged in a massive search for Zachary. At one point state police officers were outside the Snider residence when Stevens drove past. The officers approached the car and asked Stevens for an interview. Stevens agreed and followed the officers to the Putnamville state police post. When questioned, Stevens initially reported the same story he had previously told the Rumleys about sleeping until the afternoon of July 15th and having not seen Zachary that day. He did, however, state that Zachary may have knocked on his door while he was sleeping, but that he did not answer it. When the police informed Stevens that Zachary's bike had been seen parked outside of Stevens' house that day, Stevens became agitated and began to leave. One of the officers, however, talked Stevens into returning and continuing with the interview.

During this continued portion of the interview, which the police tape-recorded, Stevens stated that Zachary had arrived at his house shortly after 4 p.m. He claimed that Zachary visited for five or ten minutes, during which time Zachary confronted Stevens with a rumor he had heard about Stevens sleeping with Zachary's mother, which Stevens denied. Stevens said Zachary then left, claiming he

would soon be picked up by a friend who was to give Zachary a ride to an uncle's house. When asked why he had previously denied seeing Zachary on the day of his disappearance, Stevens replied, "I didn't want anybody thinkin' that *I* had done somethin', because I hadn' done anything, and, and I figured that if I told you guys that, that you guys would think that *I* 'd done somethin', and I didn'." (Audio tape of interview, Ex. 9.) Asked at the end of the interview whether he had anything else to say, Stevens replied, "No, not other than, 'I didn' do anything.' " (*Id.*)

On the night of July 19, Stevens drove to the home of his older brother, Mark Stevens, and admitted killing Zachary Snider. According to Mark, Christopher stated that on July 15 he was home in bed when Zachary rode over to his house, parked his bike in the garage, came inside, and awakened Chris. The two engaged in a sexual encounter, and when Zachary threatened to tell his parents, Christopher got scared and "clicked." (R. at 4258.) He told Mark that he attempted to kill Zachary by various means of strangulation, such as a "choke hold," smothering him with a pillow, and choking him with a cord, (R. at 4249-50), although there were parts of this episode which Christopher could not remember because he had a blackout of some sort. Christopher then told Mark that he backed his car into the garage, placed Christopher's body and bike into the back, and covered them. He then drove out into the country and threw the body and bike over a bridge. The bike got caught in a tree, so Stevens went down to rearrange things so as to conceal them. He later returned to recover a plastic bag which he had left with the body. During this admission, Christopher gave Mark detailed directions to the location of the bridge.

Mark went to the state police with this information on the morning of July 21. After speaking with Mark, state police detectives went in search of the bridge described in

Mark's recitation of Christopher's confession. They "went to a location where [one detective] thought Mark Stevens was talking about, but it was the wrong one." (R. at 1309.) After a call to Mark Stevens they realized that they "went one direction and it was actually back the other way,"(*id.*), so they back-tracked and found a second bridge eight to ten miles from the first. It was on a gravel road in a remote, rural area, with no home or structure within sight of it, surrounded by thick, overgrown vegetation. Under the bridge the police found a bicycle and the fully clothed, decomposing body of a boy.

Based on Mark Stevens' statement and its corroboration by what officers found under the remote bridge, the police obtained an arrest warrant and arrested Christopher Stevens at his home on the evening of July 21. They informed him of the charges against him and drove him to the state police post in Putnamville. After being fully advised of his *Miranda* rights and signing a waiver of rights, Stevens submitted to an interview with the police.

In the videotaped confession which followed, Stevens told the officers that on Thursday, July 15, Zachary visited Stevens in the early afternoon, but stayed only for a short time, saying that he would return after he had picked up some money, talked to his father, and changed his clothes. When he returned, Zachary and Stevens talked for a while as Stevens flipped through the channels on his television, and then the two went to Stevens' bedroom and "messed around," which mainly included the two performing fellatio on each other but never anal sex. (R. at 1196-97, 1215.) This activity was not new to the pair, as they had had an ongoing sexual relationship since shortly after Stevens returned to Stardust Hills after serving his time in the Marion County jail. After they "did stuff for awhile," Zachary angrily confronted Stevens with a rumor he had heard concerning Stevens having sexual relations with

Zachary's mother. Because of this rumor, Zachary threatened to reveal Zachary and Stevens' sexual relationship to his parents. This threat made Stevens "real scared." (R. at 1215.) He stated,

> [H]e said, he, he threatened to tell ... about me and him, and, uh, I'd just went through a bunch of shit in Indy, and that was just, just on my mind. I was like, I just didn't want to, thinking to myself, you know, I just can't go through all that shit again.

(Videotape: Interview of Christopher Stevens (July 21, 1993) (Sep. Bound R. of Proceedings, Ex. 15)).

After Zachary's threat, the two "messed around some more," which Stevens again stated meant "having sex." (R. at 1198.) Once finished, Stevens led Zachary by the hand into his brother's room and the two got onto the bed. Stevens took one of his brother's pillows and placed it over Zachary's face in an attempt to suffocate him. (R. at 1193, 1198.) Zachary did not really resist; rather, "he just kept sayin' 'I love you, Chris; I love you, Chris.' " (R. at 1198.) Because the pillow "wasn't doing anything," (R. at 1193), Stevens looked around the room and noticed a Sega Genesis controller on the floor. He picked it up and, using the cord, wrapped it around Zachary's neck, at first just once but then two or three times, and strangled the boy. When Stevens "thought it was all over," he removed the cord from Zachary's neck and proceeded to pace back and forth between Stevens' brother's bedroom and his own room looking at Zachary's body and contemplating what he would now do.

About five minutes later Zachary, while still unconscious, began to take deep breaths. So, Stevens said, "I went [into my kitchen] and got a trash bag and put it over his head and wrapped it around his head, he was unconscious so, you know, I knew he wouldn't be ripping it off his face and stuff." (R. at 1194.) Once the child had suffocated, Stevens carried Zachary from his brother's bedroom into his own room and laid the boy's body on his bed. Stevens later revealed to a psychologist for the defense that he killed for fear of having to return to prison brought on by Zachary's threat to tell.

Stevens then went out to the garage, pulled a trailer, lawn mower, and grill onto the driveway to make room for his car, brought his car into the garage, and shut the garage door. He then placed Zachary's bike[1] in the back of the car, went in and got Zachary's body and placed it also in the back of his car, and then covered them both with a cover. Stevens then described in detail how he drove out into the country and threw Zachary's body and bike over a bridge, naming the roads he took to reach the remote location. Initially, the bike got caught in a tree "where anybody could see it if they walked by or drove by," so Stevens "jumped down there" and pulled both Zachary's body and bicycle beneath the bridge. (R. at 1194.) In relating his state of mind during the murder and immediately thereafter, he described himself as "nervous and scared," (R. at 1200), "all frantic," (R. at 1194), and "not really thinking" (*id.*).

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[1] Zachary's bike was already in the garage because, Stevens stated, "whenever he comes over I have him put his bike in the garage, when he comes over, so no nobody will see his bike there." (Videotape: Confession of Christopher Stevens, (July 21, 1993)) (Sep. Bound R. of Proceedings Exh. 15); (R. at 1193.)

Once home, Stevens telephoned Mark White to request help in pushing the trailer in his driveway back into his garage. After White assisted Stevens and left, Stevens placed the mower and grill back in the garage, and went back inside his house.

Later that evening, Stevens took a can of Lysol and sprayed down his car, the cover used in the car to conceal the body and bike, and his and his brother's beds. He also played basketball with White, during which time he saw the Sniders driving around the neighborhood looking for Zachary. When he and White finished playing basketball, Stevens called Mrs. Snider to learn the status of their search for Zachary, but did so under the guise of inquiring about some rock concert tickets. During this call, Mrs. Snider asked if Stevens had seen Zachary that day, to which Stevens said, "No." (R. at 1206) Mrs. Snider then revealed that Zachary was missing, and Stevens offered to help them look. Mrs. Snider replied that she would call him if they needed his help. Although she never called back, Stevens went over to their home just before 9 p.m. As he talked with Mrs. Snider, he saw a policeman arrive and walk up the Sniders' driveway. Because Stevens "didn't want to be around the cop," (R. at 1207), he told Mrs. Snider that he would "go check a couple of places" and quickly departed, (*id.*) Stevens then went to various houses asking the occupants if they had seen Zachary.

Later that night Stevens returned to Zachary's body because he recalled leaving the plastic trash bag wrapped around Zachary's head. Stevens stated, "I went back out there to get the trash bag 'cause, I figured if you guys [the police] seen the trash bag and looked in our house and seen the same kind of trash bags and, and stuff." (R. at 1194.) Stevens described the trash bag as one with handle ties, green outside and black inside. Upon recovering the bag, Stevens drove away from the scene and, after

traveling some distance, threw the bag out of his window. Upon returning to Stardust Hills he again went to the Sniders' house and inquired whether they had heard anything yet, telling them he was up at that late hour because he was having trouble sleeping.

After the confession, the police searched for the trash bag mentioned by Stevens. They found one matching Stevens' description on the side of the road about a mile from where the body was located. While other bags observed during their search all contained trash, this one contained only road dust and debris, and appeared to have "at one time contained something that caused it to be stretched out," (R. at 3897). Later that same day, pursuant to a search warrant, police found similar trash bags and a Sega Genesis video game and controllers in Stevens' home.

The body found by police under the bridge was later identified through dental records as that of Zachary Snider. Also, Mr. Snider later identified the bike found with the body to be Zachary's. The pathologist who performed the autopsy, though unable to determine the cause of death because of the state of decomposition, observed no evidence inconsistent with death by either strangulation or suffocation. He found no broken bones and no evidence of any penetrating injury to the torso or lower extremities. When asked about the potential for a natural cause of death, the pathologist replied that the tissues of the heart, lungs, liver, and kidneys available for examination showed no signs of disease. The forensic entomologist who examined insect samples found in the body and in the soil under the bridge placed the time of death sometime between noon and sunset on July 15.

In August 1993, Stevens sent his step-mother a letter which said in part, "I'm sorry for killing someone in your house and causing you guys so much greif [sic]. I guess it

is like everybody has always said. I guess I'm nothing but a worthless, perverted peice [sic] of trash." (R. at 4309, 4311.) Tracy Easton also received a letter from Stevens during this same time period, part of which stated, "You know your prediction was right. You said you thought I'd be right back in jail two months after I got out. Well, I was back in four days short of two months. I think you might have cursed me. HA! HA! I don't really know what to say. Does it suprise [sic] you?" (R. at 4583.)

I. Prosecutorial Conduct

Stevens makes several allegations of prosecutorial misconduct. To prove prosecutorial misconduct, an appellant must show both that the prosecutor's actions amounted to misconduct and that the misconduct, in light of all the circumstances, placed the defendant in a position of "grave peril" to which he should not have been subjected. *Maldonado v. State*, 265 Ind. 492, 355 N.E.2d 843 (1976). "Grave peril" is determined by analyzing "the probable persuasive effect of the misconduct on the jury's decision," *id.* at 499, 355 N.E.2d at 848, and whether there were "repeated instances [of misconduct which] evidence a deliberate attempt to improperly prejudice the defendant," *id.*, 355 N.E.2d at 848. Before we will analyze a claim of prosecutorial misconduct, however, the defendant must have made a timely objection to the alleged misconduct at trial to secure the issue for our review. *Id.* at 497-98, 355 N.E.2d at 848. Failure to so object waives the issue. *Id.*, 355 N.E.2d at 848.

Stevens makes several claims about prosecutorial misconduct during voir dire. One allegation arises from the prosecutor's display and reading of the entire death penalty statute, including its list of aggravating circumstances, to each panel of prospective jurors. The record discloses that this occurred as the prosecutor explained the different steps

through which the statute requires a capital trial to go, and then asked the prospective jurors if they understood the process and had any questions or problems with it. (*See, e.g.,* R. at 1626-1633.) Stevens failed to object, however, thereby forfeiting appellate review of any alleged error arising from the prosecutor's actions.

In his reply brief, Stevens responds to the State's claim of waiver by inviting this Court to consider the prosecutor's actions under the "fundamental error" doctrine. Even if we were to consider improper the reading, displaying, and explaining the death penalty statute to prospective jurors during voir dire, such actions could not be said to so prejudice the rights of a defendant as to make a fair trial impossible, *see, e.g., Tobias v. State,* 666 N.E.2d 68 (Ind.1996); *Townsend v. State,* 632 N.E.2d 727 (Ind.1994). This is particularly true in Stevens' case, where the court informed the jury several times of the State's burden to prove the existence of at least one of the *charged* aggravating circumstances beyond a reasonable doubt, (R. at 5455-56, 5458-61), and the specific findings in the jury's recommendation indicate that only the charged aggravating factors were considered in the balancing process, (*see* R. at 987-88).[2]

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[2] The common law doctrine of "fundamental error" was originally adopted to permit appellate courts a means by which they could correct the most egregious and blatant trial errors that otherwise would have been procedurally barred on direct appeal. Although intended for application in only the most exceptional of instances, appellants now flippantly claim as "fundamental" any and all alleged errors unpreserved by contemporaneous objection, regardless of the true weight of their claims, effectively causing the exception to swallow the rule. In 1985 we noted that "if the fundamental error doctrine is to continue to have any meaning it cannot become a ruse to circumvent the necessity of timely

Stevens also alleges that the prosecutor committed misconduct during voir dire by commenting on the existence of inadmissible evidence. After the prosecutor's discussion of aggravating circumstances with the third panel[3] of prospective jurors, he explained that because of

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> objecting to alleged error during the trial." *Cox v. State,* 475 N.E.2d 664, 670 (Ind.1985). Continued attempts at such circumvention have led this Court, twelve years later, to propose Criminal Rule 8.5(b), which would abolish the doctrine of fundamental error in all but a few narrow instances. *See generally* Comments Sought on Proposed Amendments, *Res Gestae,* July 1997, at 8-9. "Fundamental error" should be a rare, rather than merely an alternative, claim. As Justice Arterburn wrote nearly forty years ago,
>
> > It is a fundamental principle that a party may not sit by during trial and make no objection or complaint, await the outcome of the trial, and if unfavorable, then claim error which could have at the time been promptly called to the attention of the trial court. A trial court should be given the opportunity to correct its own mistakes before asking a review from a court of appeals.
>
> *Brown v. State,* 239 Ind. 184, 188, 154 N.E.2d 720, 721 (1958). As we have more recently stated in *Canaan v. State,* 683 N.E.2d 227 (Ind.1997),
>
> > It is true that we have acknowledged an exception to the waiver rule in circumstances where the trial court committed "fundamental error." But we view this exception as an extremely narrow one, available only "when the record reveals clearly blatant violations of basic and elementary principles [of due process], and the harm or potential for harm [can]not be denied."
>
> *Id.* at 235 n. 6 (quoting *Warriner v. State,* 435 N.E.2d 562, 563 (Ind.1982)).

[3] The prosecutor made similar comments to the first two panels of prospective jurors. Because Stevens did not make timely objections to the first two statements of this kind, however, he forfeited review of any alleged error arising therefrom. *Mftari v. State,* 537 N.E.2d 469 (Ind.1989).

Bivins v. State, 642 N.E.2d 928 (Ind.1994), *cert. denied,*516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734 (1996), the State could only present evidence relevant to the statutorily prescribed aggravators, and thus any evidence of "victim impact" not relevant to those factors would not be introduced.[4] In response to Stevens' objection, the court admonished the prospective jurors to consider only the evidence presented by the parties, not to speculate on the existence or nonexistence of evidence not presented by the parties, and to disregard the prosecutor's remarks regarding victim impact evidence.

Regardless of whether the prosecution's comment on *Bivins* was improper, it could not be said to have placed

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[4] After reading Indiana Code § 35-50-2-9(b) to the prospective jurors, the prosecutor stated,

> The State has to prove beyond a reasonable doubt-to get that the State has to prove at least one of those aggravating circumstances.
>
> Has everybody had a chance to read it? Any questions?
>
> This is the time to ask if you have any questions. Okay.
>
> Part C talks about-there is something else I wanted to mention with this. At the phase of sentencing, the State can only present evidence that goes directly to one of these points.
>
> I know that some of you follow-maybe you hear about victim impact statement [sic], what it does to family, all this other stuff. In any criminal case where murder is charged and the State is asking for the death penalty, under a recent case that came out in the last three months, *Bivins v. State,* the State may not go into anything else other than what's listed in this statute at the sentencing hearing, so don't expect-
>
> (R. at 2170-71.)

Stevens in a position of "grave peril," as its probable persuasive effect on the jury's verdict and/or sentence is nil. First, the comment was innocuous, and the admonishment was more than adequate to cure any minute prejudice the comment could possibly have caused. Second, regardless of what was said by the parties, no reasonable juror could have sat through this trial without feeling great empathy for Zachary's parents, wondering how he or she would feel if his or her own ten-year-old child were sexually molested by a neighbor, brutally suffocated and strangled, and then dumped over a remote bridge to decompose beyond recognition. The prosecutor's brief, general statement in voir dire regarding *Bivins* and victim impact testimony would not have appreciably contributed to such thoughts by the jurors. In fact, as the State points out, Stevens' *own* counsel's comments were much more likely to stir juror empathy towards the Sniders. In his opening statement on sentencing, Stevens's lawyer said,

> The past three or four days have been about.... the tragic and horrible death of Zachary Snider. And I don't mean to in any way in whatever I say or do here to depreciate from that. The Sniders have suffered the most horrible loss you can imagine, the loss of a son. I feel for them. I know you do. We've seen it. Most, if not all, of you have children. There's no greater loss.

(R. at 4450.) We are satisfied the prosecutor's comment on *Bivins* during voir dire did not affect the outcome of Stevens' trial.

Stevens also alleges prosecutorial misconduct surrounding Exhibit 15, the post-arrest videotape of

Stevens's confession. The tape had been redacted, pursuant to an order in limine, to remove statements referring to Stevens' previous criminal history. The prosecutor, when laying the foundation for the admission of the redacted videotape, asked the witness, "Now, this State's Exhibit 15 which we've identified as a videotape, does it, with the exceptions of certain items that were ruled inadmissible-." (R. at 3937.) Stevens immediately objected and requested a mistrial, claiming the prosecutor had violated the order in limine. (R. at 3938-39.) The prosecutor explained to the court that the witness was going to be asked if the tape was a true and accurate recording of Stevens' confession and that he thought the witness would commit perjury if he said, "yes," if in fact the tape had been modified through redaction. (R. at 3940, 3945-46, 3950.) Although the court overruled Stevens' motion for mistrial, it struck the prosecutor's question from the record, admonished the jury to disregard it, and reminded the jury that it was not to concern itself or discuss the reasons for the admissibility or nonadmissibility of evidence.

While the prosecutor's question may have been phrased differently so as to avoid informing the jury that the redacted portions of the tape had been ruled inadmissible, we do not believe the phrase at issue to be a deliberate prosecutorial attempt to prejudice the defendant, *cf. McDonald v. State,* 542 N.E.2d 552 (Ind.1989) (finding denial of mistrial appropriate where there was no basis for finding prosecutorial statement to be a "deliberate evidentiary harpoon"), and thus did not rise to the level of "misconduct."

After this incident concerning the prosecutor's question, the court admitted the videotape and played it for the jury. This version of the videotape contained Stevens stating, "I remember thinking no, I'm not going-I'm not going to go through this again," which had

previously been redacted pursuant to the court's order in limine. Stevens objected and moved for mistrial. The prosecutor explained he was surprised by the inclusion and that the error must have inadvertently occurred when his investigator attempted to make a second redacted version of the videotape to replace the first which had proved inaudible. After reviewing the tape to see the unredacted statement, the court reversed its prior ruling in limine regarding this particular statement and allowed it to stand, finding it evidence of motive under Rule 404(b), and that its probative value outweighed any negligible prejudicial effect, given that no other evidence of Stevens's past conviction had come into evidence. The court did, however, direct the prosecutor not to refer to the statement in future examination or argument.

Stevens alleges that this is just another example of the State's attempt to prejudice him through misconduct. We disagree. The trial judge found the sentence to have been "mistakenly included," (R. at 4002), and found any prejudice to Stevens to be harmless. The trial court correctly denied Stevens' motion for mistrial.

Stevens claims that prosecutorial statements during the State's guilt and penalty phase closing arguments amounted to misconduct. He did not object at trial to the statements he now claims were improper, and thus did not preserve these claims.

Finally, Stevens, citing *Foster v. State,* 436 N.E.2d 783 (Ind.1982), and *Hossman v. State,* 473 N.E.2d 1059 (Ind.Ct.App.1985), claims that the forgoing prosecutorial actions established an improper theme began in voir dire and carried throughout the trial, evincing a deliberate attempt sew "seeds of prejudice ... so that they could 'sprout in the privacy of the jury room when the jurors considered the evidence to arrive at their verdict.' "

(Appellant's Br. at 30, quoting *Foster,* 436 N.E.2d at 786.) Notwithstanding these hyperbolic allegations, nothing in this case even remotely resembles the prejudice in *Foster* or *Hossman.* Stevens is not entitled to relief under his claims of prosecutorial misconduct.

II. Rule 404(b) Claim

Stevens argues that the trial court erred by allowing the State to admit testimony regarding Stevens' contact with Zachary during the two months before the murder. He points to testimony showing that Stevens had attended a Bible study class held in the yard of Alex Krouse which Alex had also attended,[5] that Stevens had attended and videotaped one of Zachary's Little League baseball games at which he offered five dollars to any boy who hit a home run,[6] and that Stevens had taken Zachary fishing. Stevens claims this testimony was inadmissible under Indiana Rule of Evidence 404(b).

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[5] The State had expected to elicit from Krouse that Zachary had attended the class and then that Stevens had videotaped the class. (R. at 4109.) Because Krouse testified that he could not remember if Zachary had attended the class, the State stopped questioning Krouse regarding it and withdrew the previous question, (R. at 4110), which had been, "And, what, if anything, did Christopher do at the class?" (R. at 4109.) Stevens's only objection to this question at this time regarded its relevance. (R. at 4108, 4110.)

[6] Stevens' brief also refers to testimony given by Lori Rumley, the mother of Alex Krouse, regarding the baseball game. (Appellant's Br. at 44.) He provides neither quotes of her allegedly objectionable testimony nor citation to where such testimony might be found in the record, however. Ind.Appellate Rule 8.3(A)(7). Accordingly, we will only review the testimony to which Stevens properly draws our attention.

The Indiana Rules of Evidence provide that all relevant evidence is generally admissible. Ind. Evidence Rule 402. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. The State's theory of the case was that Stevens killed Zachary to prevent him from disclosing Stevens's sexual molestations of Zachary. (R. at 4140.) Thus, the circumstantial evidence at issue was relevant in that it allowed the jury to infer an ongoing relationship between the two, which corroborated the testimony of Mark Stevens and appellant's confession regarding motive.

Stevens' argument that Rule 404(b) proscribes admission of this testimony is misdirected, for Rule 404(b)[7] does not apply to this evidence. Commonly known as a rule addressing "uncharged misconduct," *see Hardin v. State,* 611 N.E.2d 123, 128 (Ind.1993), or "prior bad acts," *see Johnson v. State,* 655 N.E.2d 502, 504 (Ind.1995), Rule 404(b) has normally applied to evidence of a defendant's extrinsic activity which reflects adversely on his character. *United States v. Roe,* 670 F.2d 956, 966 (11th Cir.1982). Videotaping a baseball game, attending a neighborhood Bible study, and taking a child fishing are not extrinsic activities which would, by themselves, indicate any unsavory character trait with which Stevens' could have acted in conformity on the

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[7] Rule 404(b) states,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,....
>
> Ind.Evidence Rule 404(b).

day of Zachary's murder. Only after corroborating the direct evidence of motive contained in both Mark Stevens' testimony and the appellant's own confession does the challenged evidence take on a darker inference.

Because this evidence does not fall within the ambit of 404(b), its admissibility is left to the balancing test of Rule 403.[8] We conclude that this evidence tends to corroborate the testimony of Mark Stevens and appellant's own confession, and that any unfair prejudice that might accrue from it is slight.

III. Admissibility of Confession

The Indiana State Police arrested Stevens in his driveway at about 7 p.m. on July 21, 1993, pursuant to an arrest warrant issued by the Putnam Circuit Court. Stevens claims that his arrest was illegal because the affidavit submitted to Judge Pro Tempore Sally Gray by the police was insufficient to establish probable cause. He argues that his confession was thus inadmissible as the product of an improper arrest.

In felony cases, arrest warrants are only required when physical entry of a home is necessary to effect the arrest. *New York v. Harris,* 495 U.S. 14, 17-18, 110 S.Ct. 1640, 1642-43, 109 L.Ed.2d 13 (1990). As *Harris* plainly states, warrantless arrests outside the home are permissible so

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[8] Rule 403 states,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Evid.R. 403.

long as the arresting officer has probable cause to believe the defendant committed a felony. *Id.* The warrant line is drawn at the entrance of the home because " ' "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ' " *Id.* at 18, 110 S.Ct. at 1643 (quoting *Payton v. New York,* 445 U.S. 573, 585, 100 S.Ct. 1371, 1379-80, 63 L.Ed.2d 639 (1980) (quoting *United States v. United States District Court,* 407 U.S. 297, 313, 92 S.Ct. 2125, 2134-35, 32 L.Ed.2d 752 (1972))). Because the state police arrested Stevens in his driveway,[9] we need only address whether the officers had probable cause to arrest Stevens on July 21, 1993, and need not address the alleged infirmities in the issuance of the arrest warrant.

Probable cause to arrest exists when either a particular law enforcement officer or the organization of which he is a part has knowledge of circumstances and facts that would cause a person of reasonable caution and prudence to believe that the defendant has committed a particular crime. *Duncanson v. State,* 509 N.E.2d 182 (Ind.1987). "When law enforcement officers rely on a tip received from a third source, probable cause may be established by

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[9] Some might maintain that one's driveway is within the curtilage of one's home and thus within the ambit of Fourth Amendment protection, but *Harris* appears to preempt such an argument:

> For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris *on his doorstep,* illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible.

Harris, 495 U.S. at 18, 110 S.Ct. at 1643 (emphasis added).

verification of extensive facts which sufficiently demonstrate the reliability of the tip." *Id.* at 185.

Mark Stevens, the appellant's own brother, went to the State Police on the morning of July 21 and informed them that the appellant came to his house on July 19, confessed in detail to killing Zachary Snider, and particularly described where he had concealed the body. The state police corroborated Mark Stevens' statement by finding a bicycle and the decomposing body of a boy under the remote, overgrown bridge described by Mark Stevens' directions. While they could not positively identify the body at that time due to the advanced state of decay, the investigating detective on the scene believed its appearance to be consistent with how the body of a ten-year-old Caucasian boy would look six days after death. Also, the bike matched a description the detective had previously received, as well as did the khaki pants found on the body.

These extensive facts would be adequate to cause a reasonably cautious and prudent person to believe Mark Stevens' statement true, and thus to believe Christopher Stevens guilty of the crime. However, the state police had even more (such as Stevens' lies to the police four days earlier). The totality of the circumstances more than establish probable cause to arrest Christopher Stevens for the murder of Zachary Snider. Therefore, Stevens' confession was not the product of an unlawful arrest.

Stevens also claims that his post-arrest confession was made involuntarily. The state police advised Stevens of his *Miranda* rights, and his right to cease answering questions at any time, before they began the interview. Stevens then signed a waiver of rights form. Moreover, Stevens indicated before the interview began that he had no reservations about talking to the detectives, and he confirmed that he was agreeing to speak to them without a

lawyer present and that he understood his rights. Finally, review of the videotape clearly indicates no elements of coercion. The entire interview lasted about an hour. Instead of showing overbearing officers soliciting short, "yes/no" responses from a broken, harassed, tired suspect, the tape shows non-threatening police officers asking general questions of Stevens, and then an alert, responsive Stevens supplying long, detailed narrative. (Videotape: Confession of Christopher Stevens (July 21, 1993) (Sep. Bound R. of Proceedings Exh. 15).) The trial court properly admitted Stevens' confession.

IV. Corpus Delicti

Stevens claims the trial court erred in admitting his confession because insufficient evidence of corpus delicti existed to support it. "In Indiana, to support the introduction of a defendant's confession into evidence, the corpus delicti of the crime must be established by independent evidence of 1) the occurrence of the specific kind of injury and 2) someone's criminal act as the cause of the injury." *Willoughby v. State,* 552 N.E.2d 462, 466 (Ind.1990). As we stated recently in *Johnson v. State,* 653 N.E.2d 478, 480 (Ind.1995), the independent evidence need not be shown beyond a reasonable doubt; rather, the evidence need only provide an *inference* that a crime was committed.

The positively identified body of Zachary Snider was found *underneath,* and not beside, a remote, small bridge in rural Putnam County. The bridge's sides were overgrown with tall, thick vegetation, and the small, shallow stream which ran underneath it was only a few feet wide. There appears to be no real possibility that Zachary rode his bike to this remote location and fell, with his bike, over the guardrail to wind up directly underneath the bridge. Rather, if he had fallen over, he would have landed in the overgrown vegetation on either side of the bridge, and the

stream was not deep enough and the current not strong enough to have carried him and his bicycle underneath it.

Furthermore, while the pathologist who performed the autopsy on Zachary's body could not determine the exact cause of death due to the degree of decomposition, he examined the skull, neck and rest of the body and found no broken bones and no penetrating injury to the chest, abdomen, or lower extremities, injuries which would likely accompany a fatal fall from a bridge. While there may be plausible non-homicidal explanations for why Zachary's body and bike were found where they were, "[t]he independent evidence supporting the corpus delicti need not preclude every possible explanation of the circumstances." *Johnson,* 653 N.E.2d at 480 n. 4. While "[a] dead body alone is not proof of the corpus delicti in a homicide case; ... an identified dead body with ... surrounding circumstances that would indicate the deceased did not die from natural causes establishes prima facie that a homicide has been committed and the corpus delicti." *Brown v. State,* 239 Ind. 184, 190, 154 N.E.2d 720, 722 (1958), *cert. denied,*361 U.S. 936, 80 S.Ct. 375, 4 L.Ed.2d 360 (1960).[10] The surrounding circumstances in this case provide a sufficient inference of criminal agency to satisfy the corpus delicti rule.

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[10] The facts of Stevens' case are very similar to those in *Brown.* There, we found corpus delicti established by a positively identified corpse found "decomposed and under a pile of stone and trash, obviously concealed by some person,"*id.* at 193, 154 N.E.2d at 723. As in *Brown,*"[a]ny reasonable person would come to the conclusion that [the victim] had been killed or murdered by some one who had concealed the body." *Id.* at 193, 154 N.E.2d at 723.

One of the aggravating circumstances found to justify Stevens' death sentence was that he murdered Zachary Snider while committing child molesting. Ind.Code Ann. § 35-50-2-9(b)(1)(C) (West Supp.1997). (R. at 5480, 5642-43.) Stevens argues his death sentence must be reversed because there was no independent evidence of child molestation besides that found in his confession.

We addressed an analogous claim in *Willoughby v. State,* 552 N.E.2d 462 (Ind.1990), where an appellant convicted of murder, felony-murder, robbery, and confinement argued that his confession, which implicated him on all four counts, should not have been admitted because corpus delicti had not been established for each of the crimes. *Id.* at 465-66. After reviewing the genesis of the corpus delicti rule, the justifications underlying it, and its present declining utility, *id.* at 466-67,[11] we concluded that

> where a defendant confesses to several crimes of varying severity within a single criminal episode, strict and separate application of the corpus delicti rule to each offense adds little to the ultimate reliability of the confession once independent evidence of the principal crimes is introduced. The confession at that point has been substantially corroborated. In such a case the confession stands as direct evidence of each crime, even those not separately corroborated, if the independent evidence establishes the

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[11] *See also* Diane M. Moore, *Indiana's Corpus Delicti Rule: Time for a Change,* Res Gestae, Aug. 1997, at 24-30.

> corpus delicti of the principal crime or crimes.

Id. at 467.

We believe this reasoning logically extends to death penalty aggravators alleged to have occurred as part of the same criminal episode. *Accord State v. Lee,* 335 N.C. 244, 439 S.E.2d 547 (1994); *State v. Bishop,* 753 P.2d 439 (Utah 1988). An inference of murder exists from the independent circumstances of this case. As such, separate application of the corpus delicti rule to the child molestation aggravating factor would "add[ ] little to the ultimate reliability of the confession." *Willoughby,* 552 N.E.2d at 467. Stevens' confession was fully admissible as direct evidence of the child molestation aggravating factor.

V. Voluntary Manslaughter Instruction

Stevens claims the court erred in refusing his tendered voluntary manslaughter instruction. In *Wright v. State,* 658 N.E.2d 563 (Ind.1995), we set forth a three-step analysis for determining when a court should give a lesser included offense instruction. First, the court must determine whether the lesser included offense is *inherently included* in the crime charged. If not, then it must determine whether the lesser included offense is *factually included* in the crime charged. If either of the first two steps are satisfied, then the court must determine whether a *serious evidentiary dispute* exists whereby the fact-finder could conclude that the defendant committed the lesser, but not the greater, offense. If the court reaches the third step and answers affirmatively, it should give the requested instruction. *Id.* at 566-67. Any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter. *Roark v. State,* 573 N.E.2d 881, 882 (Ind.1991) (citing cases).

As for *Wright* 's first step, we recently analyzed our murder[12] and voluntary manslaughter[13] statutes and concluded that the latter is inherently included within the former. *Horan v. State,* 682 N.E.2d 502, 506-07 (Ind.1997). Therefore, we proceed to consider whether a serious evidentiary dispute existed regarding Stevens acting under "sudden heat."

"Sudden heat" occurs when a defendant is provoked in a way sufficient to "excite in [his] mind ... such emotions as either anger, rage, sudden resentment, or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation, premeditation, to exclude malice, and to render the defendant incapable of cool reflection." *Dickens v. State,* 260 Ind. 284, 293, 295 N.E.2d 613, 618 (1973); *see also Clark v. State,* 668 N.E.2d 1206, 1209 (Ind.1996). Appellant points to parts of Mark Stevens' testimony and parts of his own confession which indicate that he killed Zachary out of fear created when Zachary threatened to expose Stevens' sexual molestations of the boy. According to Mark Stevens, the appellant told him that when Zachary threatened to tell, he just "clicked," or "went off," such that he could not remember some of the specifics of the murder. (R. at 4258.) Stevens' own confession also indicated Zachary's threat made him "real scared." (R. at 1215.) This evidence, Stevens argues, warranted an instruction on whether "sudden heat" caused him to kill Zachary.

We disagree with Stevens' argument for several reasons. First, we have stated many times that "words alone cannot constitute sufficient provocation to give rise

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[12] Ind.Code Ann. § 35-42-1-1 (West Supp.1997).

[13] Ind.Code Ann. § 35-42-1-3(a) (West Supp.1997).

to a finding of sudden heat warranting an instruction on voluntary manslaughter." *Matheney v. State,* 583 N.E.2d 1202, 1205 (Ind.1992) (citing *Perigo v. State,* 541 N.E.2d 936 (Ind.1989)). This is especially so where the "words" at issue are not intentionally designed to provoke the defendant, such as "fighting words," *Perigo,* 541 N.E.2d at 941 (Dickson, J., concurring and dissenting), but rather amount to a threat to "tell on" the defendant for his acts of child molestation.

Second, the standard turns on provocation "sufficient to obscure the reason of an ordinary man." *Dickens,* 260 Ind. at 293, 295 N.E.2d at 618. Thus, the relevant question is not whether Stevens was actually afraid of having his sexual molestation activity revealed by Zachary, but rather whether a ten-year-old boy's threat of "I'm telling my mom on you" would understandably provoke an ordinary twenty-year-old man to explosive rage or terror. We think not.

Third, the facts indicate that there was nothing "sudden" about Stevens' decision to kill Zachary. When Zachary "threatened" Stevens, rather than erupting in blind rage Stevens engaged the boy in further acts of sexual molestation. Only after he was finished did Stevens then lead the boy by the hand into a different room to set about killing him. Also, Stevens had told his former cellmate that he would kill his next victim rather than allow him to tell so as not to be convicted, again, of child molesting. (R. at 4587-88.) Stevens clearly contemplated this course of action before it occurred, and his "fear" did not obscure his ability to obtain further perverse gratification before coolly leading his victim to another room to kill him. Clearly, the impetus to kill did not just suddenly overwhelm Stevens.

Fourth, even if a boy's threat to expose his child molester could sufficiently engender "sudden heat," a

sufficient "cooling off" period occurred here so as to negate any "sudden fear" that might have overwhelmed Stevens. Stevens attempted to smother the boy while the boy cried out, "I love you, Chris. I love you, Chris." Then, when that was not working, Stevens strangled Zachary with a cord until the boy appeared dead. Five minutes later, after Stevens had removed the cord and himself from Zachary and paced back and forth contemplating how he would dispose of the body, Zachary again began to breath. This was ample time for Stevens to collect his wits and realize the heinousness and depravity of his actions. Instead, at that point when Zachary's unconscious body again began to fight for life, Stevens coolly and deliberately devised and carried out yet a third way of attempting to silence the boy permanently-by going to his kitchen, finding a trash bag, and smothering the helpless boy with it.

This murder was premeditated, deliberate, and drawn-out. Nothing in these facts bespeaks a "serious evidentiary dispute" as to whether Stevens did anything other than intentionally, knowingly, and mercilessly murder Zachary Snider.

VI. Constitutionality of Death Penalty Statute

Although acknowledging that we have previously decided to his detriment many of the arguments he advances, Stevens makes numerous challenges to Indiana's death penalty statute "to preserve them should this [C]ourt reverse its earlier holdings and for federal review." (Appellant's Br. at 70.) For those claims previously addressed by this Court adversely to Stevens,[14]

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[14] *Harrison v. State*, 644 N.E.2d 1243, 1258 (Ind.1995) (prosecutorial discretion in seeking death penalty not unconstitutional); *Fleenor v. State*, 514 N.E.2d 80, 90 (Ind.1987), *cert. denied*,488 U.S. 872, 109 S.Ct. 189, 102 L.Ed.2d 158 (1988) (death penalty does not violate Art. I, § 18, of the Indiana Constitution); *Lowery v. State*,

as Justice DeBruler said, "The court does not choose to reassess its position at this time." *Daniels v. State,* 528 N.E.2d 775, 783 (Ind.1988).

Citing *Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), but without reference to any specific pages, Stevens claims that capital juries are more

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640 N.E.2d 1031, 1043-44 (Ind.1994) (jury as recommender rather than as sentencer does not violate *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *Peterson v. State,* 674 N.E.2d 528, 541 (Ind.1996) (judicial override provision of death penalty statute does not deprive capital defendant of right to trial by jury); *Miller v. State,* 623 N.E.2d 403, 410 (Ind.1993) (statute does not require sentencer to consider irrelevant enumerated mitigating factors, nor does it ascribe too little weight to non-enumerated mitigating factors); *Bivins v. State,* 642 N.E.2d 928, 947 (Ind.1994) (qualifying language in enumerated death penalty mitigators does not preclude or restrict consideration of relevant mitigating circumstances under the "catch-all" mitigator); *see also Blystone v. Pennsylvania,* 494 U.S. 299, 304-05, 110 S.Ct. 1078, 1082-83, 108 L.Ed.2d 255 (1990) (finding statutory scheme having enumerated aggravators with qualifying language, combined with "catch-all" mitigator, did not prevent jury from considering all relevant mitigating evidence); *Bivins,* 642 N.E.2d at 945-46 (statute does not impermissibly shift burden of proving whether aggravation outweighs mitigation to defendant); *Moore v. State,* 479 N.E.2d 1264, 1281 (Ind.), *cert. denied,*474 U.S. 1026, 106 S.Ct. 583, 88 L.Ed.2d 565 (1985) (statute not unconstitutional because it does not state that aggravators must be found to outweigh mitigators beyond reasonable doubt); *Woods v. State,* 547 N.E.2d 772, 794 (Ind.1989) (incorporation of guilt phase evidence into penalty phase does not present risk of jury considering non-statutory aggravating circumstances as part of sentencing determination when trial judge properly instructs jury that it can only consider statutory aggravators); *Miller,* 623 N.E.2d at 411 (statute not unconstitutional because it allows State to present the final closing argument in the penalty phase).

"conviction-prone" than non-capital juries; therefore, due process requires a prosecutor to submit the issue of capital qualification to a neutral fact-finder before proceeding to select a "death-qualified" jury. Not only does *Lockhart* fail to support this premise,[15] but it also refers to "death-qualified" juries as "impartial," *see id.* at 175-76, 180, 106

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[15] Stevens' brief states, "In *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 ... (1986), the United States Supreme Court recognized the validity of studies establishing 'that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death qualified" juries.' *Id.*" Counsel then builds two claims against Indiana's statute upon this premise. (Appellant's Br. at 71-72 (quoting *Lockhart*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137).) An honest approach would have supplied the full quote from *Lockhart:*

> Having identified some of the more serious problems with McCree's studies [regarding "death-qualified" juries being "conviction-prone"], however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.

Lockhart, 476 U.S. at 173, 106 S.Ct. at 1764-65. Not only did the Supreme Court *not* recognize the validity of these studies (the quote clearly shows the Court merely saying that even if the studies were valid, their validity would not change the outcome of the case before it), but the *four U.S. reporter pages* preceding this quote contain *detailed criticism* of the fifteen social science studies introduced by McCree showing their *insufficiency* at proving that "death-qualified" juries are more "conviction-prone." *See id.* at 168-173, 106 S.Ct. at 1762-65. We do read the cases cited in appellate briefs and have low regard for patently false assertions regarding the precedent from which they are lifted. Ind.Professional Conduct Rule 3.3(a)(1) ("A lawyer shall not knowingly ... make a false statement of ... law to a tribunal....").

S.Ct. at 1765-67, 1768-69, when reaching its conclusion that "death-qualification" of juries is constitutionally permissible. We fail to see how submission of a case to an impartial jury could offend notions of due process.

Stevens claims the death penalty statute is unconstitutional because it does not specifically require the sentencer to ascribe some degree of weight to every piece of mitigating evidence offered by a capital defendant. While the statute does not specifically so state, it does require a sentencer, before imposing the death sentence, to find specifically that "any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind.Code Ann. § 35-50-2-9(k)(2) (West Supp.1997). By necessity, therefore, the sentencer must ascribe some weight to the mitigating circumstances which actually exist in order to perform such a balance. A sentencer need not, however, ascribe the same weight to the mitigating evidence that the defendant does, nor must it give any weight to evidence which it believes irrelevant or false. *Widener v. State,* 659 N.E.2d 529, 533-34 (Ind.1995) (stating that the sentencing court "is not obligated to find that mitigating circumstances exist at all," if in fact they do not).[16]

VII. Life Without Parole Amendment

Since the late 1970's Indiana has employed a death penalty scheme which permits a jury to recommend and a judge to impose a death sentence only when the State has proven beyond a reasonable doubt the existence of one or more enumerated aggravating circumstances and that

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[16] Alternatively, one might say that by determining such evidence to be false, a sentencer *has* ascribed a weight to such evidence, a weight of "zero."

those aggravating circumstance(s) outweigh any mitigating circumstances. Ind.Code Ann. § 35-50-2-9 (West 1978 & Supp.1997). In 1981, we held that this scheme complies with U.S. Supreme Court Eighth Amendment jurisprudence which required that a sentencer's discretion be sufficiently channelled and the sentence reviewed so as to prevent "arbitrary and capricious" imposition of the death penalty. *Judy v. State,* 275 Ind. 145, 416 N.E.2d 95, 105-08 (1981) (citing *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

In 1993 and 1994 the legislature amended the statute to allow a choice between death and life imprisonment without the possibility of parole. Pub.L. No. 158, § 7, 1994 Ind. Acts 1854; Pub.L. No. 250, § 2, 1993 Ind. Acts 4478, 4481 (now codified at Ind.Code Ann. § 35-50-2-9 (West Supp.1997)). The amended statute provides no instruction for distinguishing between the possible sentences once the jury and/or judge have found the aggravators to outweigh the mitigators. Thus, the court in this case did not instruct Stevens' jury concerning what factors should influence its sentencing determination if it should find the aggravators to outweigh the mitigators. Stevens claims that because the statute, on its face and as applied, does not specify a standard for choosing one sentence or the other, the jury's and judge's discretions are not adequately guided, thus violating the Eighth Amendment.[17]

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[17] Stevens also cites article one, sections thirteen, sixteen, eighteen, and twenty-three, of the Indiana Constitution in support of his claim. Because he provides no separate legal analysis under sections thirteen, eighteen, and twenty-three beyond their mere citation, however, Stevens waives any claims he might have thereunder. *Bivins v. State,* 642 N.E.2d 928, 936 n. 1 (Ind.1994), *cert. denied,*516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734 (1996).

In *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Court said:

> A fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Id. at 874, 103 S.Ct. at 2741 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932-33, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The respondent in that case argued that this mandate in *Furman* was "violated by a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute." *Id.* at 875,103 S.Ct. at 2741-42. The Court dismissed this argument, however, because it "could not be accepted without overruling [the] specific holding in *Gregg*." *Id.* The Court stated:

Similarly, the only other mention of section sixteen beyond its initial citation comes in reference to the statement, "In a capital case, state constitutional guarantees provide more extensive protection than that guaranteed by the 8th Amendment." (Appellant's Br. at 81-82.) Such a general proposition, without more, does not qualify as "cogent argument" sufficient to preserve a section sixteen claim. Accordingly, we will review this issue under the authority from which Stevens does cogently argue, namely the Eighth Amendment.

> The approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the State Supreme Court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty.

Id. at 876,103 S.Ct. at 2742.

Similarly, allowing an Indiana trial judge, once the class of death-eligible murderers is narrowed through the balancing of aggravating and mitigating circumstances, the authority to decide with a jury's advice between life without parole and death is not constitutionally impermissible. Assessing slightly different arguments, we reach the same conclusion today in *Wrinkles v. State,* 690 N.E.2d 1156 (Ind.1997). This Court still automatically reviews the appropriateness of all death sentences. Ind. Const. art. VII, § 4. Moreover, our system, even with its life without parole amendment, still "rationally distinguish[es] between those individuals for whom death is an appropriate sanction and those for whom it is not," *Spaziano v. Florida,* 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984), by using aggravating circumstances which "limit the class of offenders upon which the sentencer is authorized to impose the death penalty," *Sawyer v. Whitley,* 505 U.S. 333, 341-42, 112 S.Ct. 2514, 2520, 120 L.Ed.2d 269 (1992). In order to arrive at a sentence of life without parole, the jury and court must

find the existence beyond a reasonable doubt of at least one of the same statutorily prescribed aggravating circumstances as they must find for a sentence of death, and likewise must find the aggravating circumstance(s) outweigh the mitigating circumstances.[18]

Thus, by definition, those who receive a sentence of life without parole are within the class of those eligible for death (i.e., for whom death would be "appropriate"), even if they receive a sentence different than death. It is this narrowing and channelling of the class of murderers which significantly reduces the risk that sentencing of murderers will be "wholly arbitrary and capricious," *Gregg,* 428 U.S. at 189, 96 S.Ct. at 2932. As the Court stated in *Lowenfield,* "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channelling the jury's discretion." 484 U.S. at 244, 108 S.Ct. at 554.

Juries and courts could have many different reasons for choosing to sentence a death-eligible defendant to life without parole instead of death. One reason, of course, could be leniency. They could decide that because the aggravating circumstances outweigh the mitigating circumstances the murderer deserves something more than a term of years, but also find some aspect of his case that makes them view death as an unacceptable sentence. Along this same line, the life without parole option allows

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[18] This is actually a little more than the Eighth Amendment requires. As the Court re-emphasized in *Lowenfield v. Phelps,* 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988), the sentencing scheme upheld as consistent with the Eighth Amendment was one under which the aggravating circumstance played no role in guiding the sentencing body other than to make a defendant eligible for death.

jurors an intermediate step over the chasm between death and the possibility that the murderer could once again be released into their community some time down the road, a step which presumably could only benefit, rather than hinder, the plight of the murderer who would rather spend his life in prison than die.

Another reason, at the opposite end of the spectrum, could be retribution. The jury and judge could decide that for a particular defendant, spending the rest of his life imprisoned would be *more* of a punishment than a quick and painless death. *See, e.g., Smith v. State,* 686 N.E.2d 1264, 1272-74 (Ind.1997) (noting that some view life imprisonment as a "slow death" and "as equally severe" as a death sentence); *Vandiver v. State,* 480 N.E.2d 910, 911 (Ind.1985) (quoting appellant, who wanted to waive appeal of his death sentence, as stating, "Well, to me [being executed] would be less than getting a tooth pulled. It would be over with.")

Just as "the absence of legislative or court-imposed standards to govern the jury in weighing the significance of [the aggravating circumstances]" did not make Georgia's death penalty scheme unconstitutional, *Zant,* 462 U.S. at 880, 103 S.Ct. at 2744, the absence of standards to govern the jury in deciding whether death-eligible defendants should, instead, receive life imprisonment does not make Indiana's death penalty scheme unconstitutional.

Also, by giving the jury and sentencer the additional option of life without parole, the statute allows for the equally important considerations enunciated in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and its progeny, which call for individualized consideration of the circumstances of the defendant, his background, and his crime as part of the sentencing determination. *Spaziano,* 468 U.S. at 460, 104 S.Ct. at

3162;*Zant,* 462 U.S. at 879, 103 S.Ct. at 2743-44. For reasons as numerous as there are defendants found death-eligible through the statute's balancing process, life without the possibility of parole may or may not be an alternative sentence bestsuited for each. By leaving the judge and jury to decide for a particular defendant, after finding death *an* appropriate sentence, whether death is *the* appropriate sentence, the statute walks the tightrope between the "two quite incompatible sets of commands,"*Callins v. Collins,* 510 U.S. 1141, 1141, 114 S.Ct. 1127, 1127, 127 L.Ed.2d 435 (1994) (denial of certiorari; Scalia, J., concurring), of *Furman* and *Lockett.*

VIII. Jury Instructions on Child Molestation Aggravator

Stevens's death sentence is based in part upon the finding that Stevens killed Zachary Snider while committing the crime of child molesting, Ind.Code Ann. § 35-50-2-9(b)(1)(C) (West Supp.1997). Stevens claims that his due process rights were violated because the jury was not instructed on the presumption of innocence and the requirements of proof beyond a reasonable doubt as to each essential element of the crime of child molesting. Therefore, Stevens argues, the trial court erred when such instructions were not given during the sentencing phase of his trial.

Stevens did not make any objection to the instructions which were allegedly lacking, nor did he tender any of his own. "Such failures result in a waiver of the issue on appeal." *Snider v. State,* 274 Ind. 401, 403, 412 N.E.2d 230, 232 (1980); *see also* Ind.Crim.Rule 8(B). As with his prosecutorial misconduct claim, *see supra* part I, Stevens attempts to evade procedural default by claiming "fundamental error" in his Reply Brief.

An error is "fundamental" if it so prejudices the rights of a defendant as to make a fair trial impossible. *Tobias v.*

State, 666 N.E.2d 68, 70 (Ind.1996). In *Bellmore v. State,* 602 N.E.2d 111 (Ind.1992), we concluded that the legislature's choice not to require penalty phase jury instructions stating either that the reasonable doubt burden of proof applies to each element of a (b)(1) aggravator, or that the defendant is presumed innocent as to such crimes, "does not run afoul of the Due Process Clause." *Id.* at 127.[19] Accordingly, the absence of such instructions does not make a fair trial impossible.[20] "Contrary to [Appellant's] assertion, we are not presented with a case of fundamental error." *Snider,* 412 N.E.2d at 232;*see supra* note 2.

IX. (b)(11) Aggravator and Knowledge of Victim's Age

Stevens's death sentence was based, in part, on Zachary Snider being under the age of twelve when

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19 Stevens cites *State v. McCormick,* 272 Ind. 272, 397 N.E.2d 276 (1979), in support of his claims regarding the (b)(1)(C) aggravator. *McCormick* found the (b)(8) aggravator ("The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder") unconstitutional when applied to a murder for which the defendant had not been convicted and which was extrinsic to the murder for which the defendant was presently on trial. For the reasons mentioned in *Lowery v. State,* 640 N.E.2d 1031, 1044 (Ind.1994) (rejecting the *McCormick* reasoning as it pertained to the (b)(1)(B) aggravator (burglary)), we reject Stevens' argument on this point.

20 Stevens' case is also similar to *Bellmore* in that the court instructed the jury numerous times during the penalty phase of the State's burden to prove the existence of at least one aggravating circumstance beyond a reasonable doubt, (R. at 5456-57, 5459, 5461, 5466-67), and the jury indicated that it had found the existence of the (b)(1) aggravator beyond a reasonable doubt, (R. at 987).

murdered. Ind.Code Ann. § 35-50-2-9(b)(11) (West Supp.1995).[21] Stevens argues that this aggravator must be understood to require the defendant's actual knowledge of the child's age when he committed the murder, and that insufficient evidence existed to show that on July 15, 1993, he knew Zachary was under twelve.

While acknowledging that this question has never been presented to this Court, Stevens argues that our holding in *Castor v. State,* 587 N.E.2d 1281 (Ind.1992), should control. In *Castor* the evidence at trial showed that the defendant might have believed the plain-clothed officers who surrounded him in unmarked cars to be mafia "hit men" when he opened fire and killed one of them. The trial court had instructed the jury according to our previous decision in *Moore v. State,* 479 N.E.2d 1264 (Ind.), *cert. denied,*474 U.S. 1026, 106 S.Ct. 583, 88 L.Ed.2d 565 (1985), which stated that the (b)(6) aggravator[22] applies if a defendant "knew or should have known" the victim was a law enforcement

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21 At the time of Stevens' trial, the aggravator "The victim of the murder was less than twelve (12) years of age" was codified at Indiana Code § 35-50-2-9(b)(11). In 1996 General Assembly amended the death penalty statute by adding what is currently the (b)(11) aggravator and redesignating former subsections (b)(11) through (b)(14) as subsections (b)(12) through (b)(15), respectively. Act of Mar. 14, 1996, Pub.L. No. 228-1996, § 1, 1996 Ind. Acts 2735-36. The victim's age aggravator is now subsection (b)(12).

22 "The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either: (A) the victim was acting in the course of duty; or (B) the murder was motivated by an act the victim performed while acting in the course of duty." Ind.Code Ann. § 35-50-2-9(b)(6) (West Supp.1994).

officer. *Castor,* 587 N.E.2d at 1289. Without specifically stating that it was overruling *Moore,* a bare majority of this Court determined that the aggravator required "actual knowledge" on the part of the defendant, rather the lesser "should have known" standard, and reversed and remanded for a new penalty phase trial and sentencing. *Id.* at 1290. The *Castor* majority said that the deterrence rationale underlying the aggravator justified the holding:

"The policy at the base of the exercise of the police power here is to create a special deterrence to the direction of physical force against [those] upon whom the security of the community depends."

....

We believe that the societal rationale for imposing death for one who kills a law enforcement official is promoted only if the defendant knew that the victim was a law enforcement official at the time of the killing.

Id. at 1289-90 (quoting *Moore,* 479 N.E.2d at 1283 (Debruler, J., dissenting)).

There was necessarily more than deterrence, however, supporting the *Castor* decision. The "knew or should have known" standard of *Moore* would deter *more* law enforcement officer murders because it would cause the hypothetical "rational murderer" to pause before killing someone who plausibly *might* be a law enforcement officer. The *Castor* "actual knowledge" standard, on the other hand, allows the "rational murderer" to err on the side of killing if he has any reason to question the status of his victim. Thus, rather than the articulated "deterrence" rationale, what appears to be the actual justification behind *Castor* 's holding is the notion of *moral culpability.* This follows because the holding makes sense only if one views a defendant who knowingly murders a police officer or

other public servant as more *deserving* of harsher punishment than one who does not know his intended victim is a police officer. If such a mens rea makes the "cop-killer" more culpable, then logically the aggravator should not apply unless the defendant actually knew it was a police officer at whom he shot.

When one sees the retributive reality behind *Castor* 's "deterrence" language, the case before us is easily distinguished. Whereas a defendant may reduce his culpability by showing that he mistook a plain-clothed police officer victim for an average citizen, a defendant will never be able to reduce his culpability by claiming that he reasonably thought his eleven-year-old victim was actually twelve. The legislature has chosen an age-based bright line, rather than a more subjective standard such as "The victim was *a young child,*" presumably to avoid both the vagueness and litigatory problems the less specific language would create. Such a decision was not unreasonable, as twelve is a rational line of demarcation between pre-pubescence and adolescence. Because there is no moral culpability rationale for distinguishing between the murderer of an eleven-year-old child and the murderer of a twelve-year-old child, as there is between "law enforcement officer" and "civilian," the actual knowledge standard of *Castor* is unnecessary for cases involving the victim's age aggravator. Moreover, by applying the victim's age aggravator regardless of the defendant's awareness of his child-victim's age, such murders will be further deterred because their perpetrators will have to be absolutely certain that their victim is twelve or older, or suffer the consequences.

Accordingly, we hold that when the (b)(11) aggravator is charged, all the State need show beyond a reasonable doubt is what the code states: that the victim "was less than twelve (12) years of age,"Ind.Code Ann. § 35-50-2-

9(b)(11) (West Supp.1995). Such a rule reflects the legislature's policies of both increased protection of young children and harsher punishment for those who prey upon them. As we stated in *Barger v. State,* 587 N.E.2d 1304 (Ind.1992):

> [F]or most of this century, the legislature has enacted and reaffirmed a consistent public policy aimed at punishing offenders more harshly when the offenders commit crimes against younger children. Younger children are more in need of protection; they are less likely to be able to defend themselves and are more susceptible to adult suggestion and schemes.

Id. at 1307.

X. Overlapping Aggravators

Stevens claims that his right to a reliable and proportional sentencing determination was violated when the jury and court considered both the (b)(1)(C) (intentional killing while committing child molesting) and the (b)(11) (victim less than twelve years of age) aggravators as part of their sentencing determination. His argument arises from the fact that at the time of his sentencing hearing, the crime of child molesting was defined as performing or submitting to sexual intercourse or deviate sexual conduct with a child under twelve years of age.[23] Because the (b)(11) aggravator was necessarily proven once the (b)(1)(c) aggravator was proven, Stevens claims that this overlapping impermissibly skewed the balance

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[23] Ind.Code Ann. § 35-42-4-3 (West 1986) (age amended to fourteen by Act of Mar. 18, 1994, Pub.L. No. 79-1994, § 12, 1994 Ind. Acts 1097); (*see also* R. at 5470-71 (instruction to jury)).

between aggravators and mitigators against him and undermined the reliability of the sentencing determination.

Stevens cites several cases from other jurisdictions which allegedly support his position. The majority of these cases address death sentences predicated upon "murder for pecuniary gain" and "murder during the course of robbery" aggravating circumstances. *E.g., Cook v. State,* 369 So.2d 1251, 1256 (Ala.1979); *Provence v. State,* 337 So.2d 783, 786 (Fla.1976); *Willie v. State,* 585 So.2d 660, 680-81 (Miss.1991). The rationale behind these cases is best summarized by *State v. Jenkins,* 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, 293-297 (1984) (overlap of murder-to-avoid-apprehension aggravator with murder-while-in-the-course-of-aggravated-robbery aggravator, and the latter with murder-in-the-course-of-kidnapping aggravator), which found that overlapping aggravators unfairly increase the likelihood of a death sentence by inflating the weighing process in favor of the prosecution.[24]

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[24] *See also Cook,* 369 So.2d at 1256 (dual application of robbery-murder and pecuniary gain aggravators "in effect condemn[s] [the defendant] twice for the same culpable act-stealing money"); *People v. Bigelow,* 37 Cal.3d 731, 209 Cal.Rptr. 328, 340, 691 P.2d 994, 1006 (1984) ("[W]e believe the court should construe special circumstance provisions to minimize those cases in which multiple circumstances will apply to the same conduct, thereby reducing the risk that multiple findings on special circumstances will prejudice the defendant"); *Provence,* 337 So.2d at 786 (robbery-murder and pecuniary gain aggravators "refer to the *same aspect* of the defendant's crime," (emphasis in original), causing "one who commits a capital crime in the course of a robbery [to] always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged"); *Willie,* 585 So.2d at 680-81 (improper to not merge felony-murder (robbery) and pecuniary gain aggravators because, "[w]hen life is at stake, a jury

Other jurisdictions have rejected this reasoning. In holding that the two aggravating factors should not be merged as one, the Supreme Court of North Carolina noted that the felony-murder aggravator and the pecuniary gain aggravators examine different aspects of the same crime, thus deserving separate consideration. *State v. Oliver,* 302 N.C. 28, 274 S.E.2d 183, 204 (1981). The Wyoming Supreme Court noted, furthermore, that the rule of merger enunciated by the other cases "is premised upon an assumption that the number of aggravating circumstances has some independent significance." *Engberg v. State,* 686 P.2d 541, 553 (Wyo.1984). In Wyoming, "the analysis of the defendant's conduct is qualitative, and the jury is not permitted to base its determination upon the quantitative weighing of aggravating circumstances." *Id.*

The analyses from North Carolina and Wyoming are persuasive. As in *Oliver,* the aggravating circumstances at issue here address different policies, even though the age of the victim is an overlapping factor in both. The felony-murder aggravator focuses on the defendant's character, finding highly culpable "the fact that the mind of the accused has in the same criminal episode formulated and held the intent to kill and the intent to commit one of the enumerated felonies." *Lowery v. State,* 640 N.E.2d 1031, 1044 (Ind.1994). *See also Woods v. State,* 547 N.E.2d 772, 794 (Ind.1989) ("The substantially contemporaneous presence of the intent to kill and the intent to commit one

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cannot be allowed the opportunity to doubly weigh the commission of the underlying felony and the motive behind underlying felony as separate aggravators"); *State v. Rust,* 197 Neb. 528, 250 N.W.2d 867, 874 (1977) ("We think it is not reasonable to construe the definitions [of aggravators] in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances").

of the serious enumerated felonies is the gravamen of [the (b)(1)] aggravating circumstance...."). The age of the victim aggravator, by contrast, focuses on the status of the victim, arising from the need to give heightened protection to younger children and to punish more severely those who harm them. *Barger v. State,* 587 N.E.2d 1304, 1307 (Ind.1992). As in *Engberg,* our death penalty statute involves the *weighing,* rather than the *counting,* of aggravating factors. Although Stevens' jurors were not instructed as clearly on this point as were the jurors in *Engberg,*[25] they were told repeatedly that they could only recommend the death or life without parole if they found the mitigating circumstances, if any, "outweighed" (and not "outnumbered") by the aggravating circumstance(s) alleged. (R. at 5458-59, 5461, 5466-67.)

We find no reason to believe that the total aggravating weight given to Zachary's age by the jury would

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[25] The trial court in *Engberg* instructed the jury:

> In making this determination you must use your reasoned judgment. You must weigh the mitigating circumstances against the aggravating circumstances and in doing so consider the following:
>
> 1. No numerical weight is assigned to any of the mitigating or aggravating circumstances.
>
> 2. The enumeration of the aggravating and mitigating circumstances does not indicate the weight to be given to any such circumstance.
>
> 3. One aggravating circumstance may be of such a nature as to outweigh one or more mitigating circumstance.
>
> 4. One mitigating circumstance may be of such a nature as to outweigh one or more aggravating circumstance.

Engberg, 686 P.2d at 553 (internal quotations omitted).

necessarily increase simply because it is mentioned in more than one factor. As the Wyoming Supreme Court said, "The sentencing authorities' balancing of aggravating and mitigating circumstances which the Florida court previously had said is never a 'simple summing of aggravating circumstances,' ... was not disturbed by the separate articulations of what is a single aspect although having separately identifiable characteristics." *Engberg,* 686 P.2d at 553 (quoting *State v. Dixon,* 283 So.2d 1, 10 (Fla.1973), *cert. denied sub. nom., Hunter v. Florida,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)).

XI. Evidence Supporting Probation Aggravator

Stevens claims the evidence was insufficient to support the finding that Stevens was on probation for a felony, Ind.Code Ann. § 35-50-2-9(b)(9) (West Supp.1997), when he murdered Zachary Snider. "In resolving this claim we apply the same standard applicable when determining the sufficiency of evidence to convict." *Fleenor v. State,* 622 N.E.2d 140, 151 (Ind.1993) (citation omitted).

> [T]his Court neither weighs the evidence nor judges the credibility of witnesses. Rather, we consider only that evidence most favorable to the State and all reasonable inferences to be drawn therefrom. If there is substantial evidence of probative value which would permit a reasonable trier of fact to find the existence of [the aggravator] beyond a reasonable doubt, then the [sentence] must be affirmed.

Johnson v. State, 490 N.E.2d 333, 334 (Ind.1986).

There is little doubt that substantial evidence of probative value existed. Christine McAfee, who had been chief probation officer for the Putnam Circuit Court until

August of 1993, testified that she met Stevens on July 15, 1993, for the purpose of accepting transfer of his probation from Marion County. The meeting was "an introductory appointment to introduce [her] as [Stevens'] new supervising probation officer." (R. at 4525.) She testified that on July 15, 1993, Stevens was on probation.

There was also substantial evidence that he was on probation for a felony. A court abstract entered as evidence showed that "Christopher M. Stevens" was convicted of class C child molesting, and sentenced by Special Judge Andrew Fogle on February 17, 1993, to four years imprisonment, with one year executed and three suspended and on probation. An Order of Probation bearing the same cause number as the court abstract, signed by Judge Fogle, and dated February 18, 1993, was also entered into evidence. Ann Dubin, a Marion County adult probation officer, testified that she met with Stevens, whom she identified in court, for at least forty-five minutes on February 3, 1993, for the purpose of preparing a presentence report. The report regarded Stevens' recent conviction for class C child molesting, for which he was to have a sentencing hearing on February 17, 1993.

From this information the jury and the court could easily conclude beyond a reasonable doubt that the probation of which McAfee spoke was that referred to in the court abstract and order of probation. Stevens' argument is without merit.

XII. Evidence of Prior Uncharged Misconduct

Stevens claims that his right to a reliable and proportionate sentence was violated when the State elicited testimony from defense expert Dr. Lawrence B. Lennon on cross-examination concerning Stevens' previous sexual molestation of an Indianapolis ten-year-old, his sexual molestations of approximately twenty-five

to thirty other children, his alleged shooting and killing of another boy "out west," (R. at 5330-32), and Dr. Lennon's opinion regarding Stevens' future dangerousness, (R. at 5355-56). Stevens did not object to this line of questioning.

Defense counsel may not have objected because it was so apparent that this testimony was relevant to countering the mitigating evidence which Stevens had up to that point placed before the jury. Stevens "opened the door" by eliciting testimony from various witnesses regarding his non-violent and law-abiding character.[26] The obvious relevance of this evidence was its tendency to indicate that Stevens was not normally a violent or dangerous person, as if the murder of Zachary Snider had been a one-time, freak occurrence. "The State may properly introduce rebuttal evidence tending to disprove mitigating circumstances shown by defendant's evidence." *Fleenor v. State,* 622 N.E.2d 140, 149 (Ind.1993). This issue is waived.

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[26] *See, e.g.,* R. at 4711 (Testimony of Billie Byrns, Stevens's aunt: Q: "Did you ever see Chris act in a violent manner in any way?" A: "No."); R. at 4888 (Testimony of Mary Criss, Stevens' grandmother: Q: "Has Chris ever been violent with you?" A: "No way, no." Q: "Have you ever seen him be violent to anybody else?" A: "No, I have not." ...Q: "Okay. But Chris has never been violent with you?" A: "No, no way. Chris has been a loving grandson, as loving as could be toward me, do anything."); R. at 4977-78 (Testimony of Matthew Stevens, Stevens' brother: Q: "Was Chris pretty nice to you?" A: "Yes." Q: "Okay. Did he ever beat up on you or anything like that?" A: "Huh-uh." Q: "Do you recall how Chris got along with John and Mark and Michelle and Angela then?" A: "Well, with Mark and John, it was kind of off and on." Q: "What do you mean by that?" A: "Well, they'd get in a few fights once in a while." ...Q: "Okay. Now, when they would get in fights, do you remember who started them?" A: "Kind of both. It could go either way." Q: "Okay. And would Chris hit John or Mark?" A: "No.")

XIII. Appropriateness of Sentence

Stevens makes numerous challenges to the appropriateness of his sentence. First, he challenges the aggravating circumstances with the same arguments addressed previously. *See supra* parts IX-XI. For the reasons mentioned there, we again reject these claims here.

Second, Stevens claims that the court failed to consider adequately the mitigating evidence he presented.[27] Stevens essentiallyclaims that because the court's sentencing statement summarizes the evidence of his bad childhood and psychological problems and does not present both as detailed or as starkly as he thinks they deserve, the sentencer obviously underrepresented the weight of this evidence in its weighing process. In finding "the defendant's troubled childhood ... to be [a] mitigating circumstance ... proven by a preponderance of the evidence," the court clearly considered Stevens' growing up "in an unstable and abusive environment," his being placed in foster care at his mother's request, his father's molestation of his step-sister, his mother's incarceration for drug dealing, and Doctor Lennon's psychological evaluation of him in coming to its finding (R. at 996-97.) While a failure to find *at all* the existence of mitigating

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[27] One sub-heading in this section of Stevens' brief states, "The Sentencing Judge Failed To Consider The Mitigating Circumstances Of Stevens [sic] Youth As Well As Other Undisputed Mitigating Circumstances." (Appellant's Br. at 121.) While Stevens makes numerous allegations under this sub-section, he fails to make any arguments regarding his age at the time he killed Zachary Snider, which was twenty, pertaining to mitigation. Assertions in headings, without supporting argument and citation in text, are not adequate to preserve a claim for our review. *Pinkston v. State,* 268 Ind. 627, 629-30, 377 N.E.2d 1355, 1356 (1978).

circumstances clearly supported by the record "may imply that they were improperly overlooked," *Crawley v. State,* 677 N.E.2d 520, 523 (Ind.1997), "the sentencing judge is not obligated to credit these factors in the same manner as would the defendant," *id.; see also Saylor v. State*, 686 N.E.2d 80, 85-86 (Ind.1997); *Hammons v. State,* 493 N.E.2d 1250, 1255 (Ind.1986). If a sentencing judge need not ascribe the same weight to the proffered mitigating evidence as the defendant, it stands to reason that the sentencer also need not discuss such evidence in his sentencing statement in as great of detail as the defendant would prefer in order to prove he or she adequately considered it. We find no indication that the trial court improperly considered or improperly weighed the available mitigating evidence.[28]

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[28] Indeed, the court's awareness of Stevens' mitigating evidence, while summarized in the sentencing statement, was clearly expressed in the court's jury instruction:

> Evidence has been introduced tending to prove the following as mitigating factors: One, Christopher Stevens was 20 years of age at the time of this offense; two, Christopher Stevens was raised in a poor, dysfunctional, nonnurturing environment; three, Christopher was physically, verbally, and emotionally abused and neglected as a child; four, Christopher Stevens was sexually abused as a child and was not believed or protected from such abuse; five, Christopher Stevens has performed poorly in school; six, Christopher Stevens was moved frequently and, therefore, was kept from establishing meaningful relationships with friends and family as a child; seven, Christopher Stevens has been diagnosed with severe depression and a passive dependent personality disorder; eight, Christopher Stevens as a child observed the sexual abuse of his step-sister; nine, Christopher Stevens was abandoned by his mother as a child; ten, Christopher Stevens has frequently considered and attempted suicide; eleven, Chris Stevens has abused alcohol and drugs as a

Third, Stevens claims that the trial court improperly considered non-statutory aggravators as part of its sentencing determination in violation of *Bivins v. State,* 642 N.E.2d 928, 955-56 (Ind.1994), *cert. denied,*516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734 (1996).

The sentencing statement begins by setting forth facts supporting the charged aggravators, finding each proven beyond a reasonable doubt. (R. at 993-96.) The statement then discusses the mitigating evidence and finds Stevens' troubled childhood and confession to be mitigating circumstances proven by a preponderance of the evidence. (R. at 996-97.) The statement then weighs the aggravating and mitigating circumstances and concludes not only that "the mitigating circumstances are far outweighed by the three aggravating circumstances," but that "the mitigating circumstances are outweighed by the [victim's age] alone." (R. at 997.) The statement then indicates the court's consideration of the jury's unanimous recommendation for death, placing "significant weight upon the jury's recommendation." (*Id.*) The court then states,

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> child and as an adolescent; twelve, Christopher Stevens has confessed to the crime of murder of Zachary Snider; thirteen, Christopher Stevens has low average intelligence; fourteen, Christopher Stevens' [sic] mother was incarcerated for a period of his formative years; fifteen, Christopher Stevens' [sic] father was incarcerated for a period of his formative years; sixteen, Christopher Stevens was cooperative with and did not resist the arresting officers; seventeen, Christopher Stevens had inappropriate role models during his formative years; eighteen, Christopher Stevens suffers from low self-esteem, and this was created and reinforced by his family and peers.

(R. at 5467-69.)

> The Court having made a separate, independent assessment of the facts of this case, having. balanced the aggravating circumstances and the mitigating circumstances, and having found that the mitigating circumstances are not outweighed by the aggravating circumstances, the Court now finds that the death penalty is the appropriate punishment for the defendant, Christopher M. Stevens, and for this crime.

(R. at 997-98.) Stevens specifically refers to the following, which concludes the court's sentencing statement:

> In addition to the evidence previously discussed, the Court finds this murder was calculated. It was motivated by self-preservation, coolly performed with deliberation, and coupled with the defendant's sexual gratification. The defendant placed the possibility of his arrest for child molesting above the life of a ten year old boy. He stated that if placed in this position he would kill in order to avoid returning to jail. That is exactly what he did. He clearly acted in a cold-blooded manner. After his first attempt to suffocate Zachary was unsuccessful, he acted intentionally and deliberately a second and third time before successfully obtaining his goal of permanently silencing the child. Imposition of the death penalty in this case is proportionate to the nature of the offense and appropriate for the defendant, Christopher M. Stevens, and the death

> penalty is therefore imposed upon Christopher M. Stevens.

(R. at 998.)

Even if the facts articulated in the judge's surplus statement indicate some influence on his decision, they appear mostly to be restatements of facts which would fall within the charged aggravating factors. Stevens himself states,

> Such terms as "calculated", "coolly performed with deliberation", and "cold-blooded manner" are no more than synonyms for the culpability element of the (b)(1) aggravator, "intentionally". Ind.Code § 35-50-2-9(b)(1). Likewise, the reference to "sexual gratification" as a reason for sentencing Stevens to death duplicates the underlying felony he found in this aggravator, child molesting.

(Appellant's Br. at 127.)

The molestation and intentional murder of a ten-year-old child by one on probation, especially probation for a previous child molesting conviction, exemplifies a crime and criminal particularly worthy of the severest of penalties. While his confession and troubled childhood were mitigating circumstances properly found present, we agree with the trial court's determination that these weighed far less than the aggravating circumstances. *See Peterson v. State,* 674 N.E.2d 528, 543 (Ind.1996), *cert. pending,* (finding evidence of defendant's "difficult childhood" to be in the "low range" of mitigating evidence). After reviewing the sentencing process and facts supporting the trial court's decision, we determine that the death penalty is appropriate under the code and the

constitutions and adequately reflects the nature of the offense and offender.

XIV. Comparative Proportionality Review of Death Sentences

Stevens reads our cases as interpreting article one, section sixteen of Indiana's Constitution[29] to require comparative proportionality review of all death sentences. Based on this premise, Stevens argues that our proportionality review violates due process because our "procedure ... is difficult to determine at this point," thus failing to provide an appellant with "notice and a meaningful opportunity to present the arguments supporting the individuals [sic] position." (Appellant's Br. at 130.)

While we have performed such review in some of our decisions, *see, e.g., Saylor v. State*, 686 N.E.2d 80, 88-89 (Ind.1997); *Peterson,* 674 N.E.2d at 543;*Bivins v. State,* 642 N.E.2d 928, 959 (Ind.1994), *cert. denied,* 516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734 (1996); *Johnson v. State,* 584 N.E.2d 1092, 1108 (Ind.1992); and have stated that appellate counsel should make comparative proportionality arguments when advocating for their clients, *Games v. State,* 535 N.E.2d 530, 538 (Ind.1989), we have not found such review constitutionally required.

Indeed, in *Baird v. State,* 604 N.E.2d 1170 (Ind.1992), we clearly stated that article one, section sixteen, "does not mandate comparative proportionality review, but review based upon the nature of the offense and offender." *Id.* at 1183. The "proportionality" mentioned in section sixteen

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[29] "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense." Ind. Const. art. I, § 16.

addresses whether the sentence given a defendant is appropriate to the nature of the particular offense and offender, not whether the sentence is reasonable in light of all other cases imposing a similar sentence.

Conclusion

The conviction and the penalty were imposed in accordance with the Indiana Code and applicable constitutional requirements.

We affirm the trial court.

DICKSON, SULLIVAN, SELBY and BOEHM, JJ., concur.

(3)

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

A. The Petition seriously misrepresents the factual basis of this claim.

The Petitioner Warden's Statement of the Case provides a gross and selective misrepresentation of the evidence, both at trial and on post-conviction, upon which this claim was properly decided. The omissions foster a misleading representation of the acts and omissions of counsel and completely ignore an honest characterization of the 'expert' Dr. Lennon. Respondent Stevens provides the following additional facts of record that properly constitute the Statement of the Case.

B. Facts from the record about Dr. Lennon and facts about trial counsels' selections and use of Dr. Lennon that are omitted from the Petition.

Prior to trial counsels' mitigation specialist, Carol Knoy, spoke with Stevens about the homicide. Knoy came away from the interview with the impression that Stevens was "talking about somebody else." She relayed her impressions to his trial attorneys. [PCR R. 1405]. Counsels also became aware prior to trial that Stevens disclosed "in pretty gory detail" that he had been raped at the age of ten. [PCR R. 1401, 2501]. Stevens explained his physical and emotional pain and how when he molested and killed Zachary, he felt like he was Zachary. [PCR R. 1402] "He had put himself in Zachary's place, and he was doing to Zachary what he wished the man who raped him would have done to him[,] and that is kill him." [PCR R.1402].

Additionally, Stevens' attorneys became aware of his extensive substance use. [PCR R. 1400] Treatment records obtained from the Katherine Hamilton Center contained multiple references to drug and alcohol abuse. [Trial R. 5136-5196].

Trial counsels believed that their client's mental condition *would* be an issue at trial, [PCR R.2499], in both the culpability and penalty phases of trial, [PCR R. 2500]. Counsels'

contact with Stevens led them to believe he was mentally disturbed and that a mental health evaluation was necessary. [PCR R.2070, 2499]. The trial court granted funding for a mental health expert. The services of Dr. Lennon were secured by counsels.

Petitioner's Statement of Facts asserts that Dr. Lennon was qualified for the mitigation task. Glaringly omitted from Petitioner's account is Dr. Lennon's statement to lead counsel Baldwin that he disagreed with the medical model of mental illness embodied in the American Psychiatric Association's *Diagnostical and Statistical Manual* (hereinafter *DSM*). [PCR R. 2504-2505, 2534, 2561] Dr. Lennon subscribed instead to the "myth of mental illness," a theory rejected by mainstream mental health practitioners. The "myth," formulated by Thomas Szasz in the early 1970's in response to the *DSM-I*, posits that *mental illness does not exist and that free will governs all conduct.* [PCR R. 2014-2015]. As the concurring opinion by Seventh Circuit Judge Ripple noted, Dr. Lennon's ideas concerning mental illness were "completely abandoned" by the American Psychiatric Association in the 1980's and that "anyone who subscribes to the 'myth of mental illness' is not really in the mainstream of current thought among professionals." (App. 34A). Petitioner Warden, excluding any reference to these facts, argues that the Seventh Circuit's analysis cannot be sustained because there is no "clearly established authority" to "support the novel assertion that counsel must not rely on the professional opinions of *properly licensed and credentialed experts.*" Pet.19.

Dr. Lennon's practice focused on family therapy, child bonding, and attachment problems. [Trial R. 5280-5281] Dr. Lennon told counsel about his own personally developed hug therapy for children suffering from attachment problems. [PCR R. 2567] Mr. Baldwin found that therapy "hard to swallow," and thought it went "along with [Dr. Lennon] not believing in mental health disease when every other expert that [he] knew of does." [PCR R.

2561-2562]. One of these 'hard to swallow' theories was Dr. Lennon's "hug therapy, putting 18-year-olds on his lap and sticking a bottle in their mouth." [PCR R.2562]. During trial, Dr. Lennon testified at length about his bonding and trust therapy. [*See gen.* Trial R. 52300-5305]. Dr. Lennon testified at trial as to how a non-bonded child might become resistant and defy a parent's will, such as refusing to take out the garbage. [Trial R. 5292-5294] He detailed at trial how his unique therapy works:

> And what that involves is if a youngster is not responding to usual therapeutic intervention with the parental permission, we will take a child who is very defiant or very violent, and we'll say to the child, "now, what we're going to do is we're going to have you lie across our laps." And we'll have pillows there. We're very careful to make sure we have pillows there, and there's a pillow on top of the child, too, so there's no accidental touches the child can construe as being sexual. [Trial R. 5299-5300]

Dr. Lennon approached Stevens' case with anger and nausea. [Trial R. 5314].

He was instructed by Stevens' counsels not to draft a report until he completed his evaluation and discussed the matter with them. [PCR R. 2074, 2094, 2506, 2560]. Contrary to these instructions, Dr. Lennon wrote a report on July 18, 1994.[1] The report contained no

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[1] The Seventh Circuit majority mitigation phase decision discusses in detail trial counsels' alert to Lennon's general tenor through his report and the inappropriateness of them turning over a copy to the prosecution.

"[g]iven the fact that defense counsel did know what Dr. Lennon had written in his report, we cannot imagine what they hoped to gain by calling Dr. Lennon to the witness stand at sentencing. This decision was the catalyst for their action in turning over Dr. Lennon's extremely detrimental written report to prosecutors prior to trial. The Indiana Supreme Court indicated that this fact did not constitute an indication of deficient performance since the trial court had required "any reports from experts" to be turned over to the State prior to trial. Stevens v. Indiana, 770 N.E.2d 739, 748 n.4 (Ind. 2002). Our review of the record reveals, however, that the trial court's order pertained only to reports from expert trial witnesses retained by the defense. Stevens's lawyers could have designated Dr. Lennon as a trial consultant rather than an expert witness, thereby shielding his written report from the prosecution. See Indiana Trial Rule 26(B)(4)(b)....." App. 23A-24A.

diagnosis and detailed no test results beyond Stevens' I.Q. score. Believing all actions a matter of free will, Dr. Lennon wrote that Stevens posed a serious future danger to society and was unremorseful about Zachary's death. He posited that Stevens killed Zachary as a result of his 'free choice' and to avoid going to prison. Dr. Lennon wrote nothing about Stevens' substance abuse or LSD use shortly before the homicide, facts about which he had been informed. [PCR R. 1887, 2013-14, 2030] Dr. Lennon failed to account for Stevens' memory lapses of which he was also aware, [PCR R. 2013], or even mention his rape at age ten. [Trial R. 5358-61]. Petitioner Warden argues that the Seventh Circuit's addressing these concerns amounts to new law obligating counsel "not just to investigate Stevens' mental health and history, but to go even further and deconstruct their own expert's evaluation, presumably with additional experts." Pet.19. Petitioner Warden has omitted critical facts that undermine that absurd assertion.

Prior to trial, lead counsel Baldwin thought Dr. Lennon missed Stevens' diagnosable mental illnesses and was unqualified to assess the import of Stevens' substance abuse, suicide attempts, depression, and sexual behavior. [PCR R. 2557-2559, 2568]. Baldwin acknowledged there *was* a need for additional mental health experts, [PCR R. 2511], testifying at post-conviction that "I would have preferred to have someone other than Lennon because I believe his area of expertise is somewhat limited" even in the mental health field [PCR 2557-2558]. Contrary to Petitioner's argument, Counsel himself admitted there was *no strategic reason* for not seeking funds for another mental health expert. [PCR R. 2511]. No request for additional funds was ever made in the months leading up to trial.

Realizing *prior* to trial, that Lennon, who did not believe in mental illness, could not confirm their belief that their client suffered from a variety of mental disorders, [PCR R. 2568], Counsel, without a mental health diagnosis, decided to defend the case on a voluntary

manslaughter defense. [PCR R. 2511-2512]. Petitioner's suggestion that this was occasioned because Dr. Lennon's opinion did not support an insanity defense is misleading and taken out of context. (Pet.7). There was nothing investigated or discussed by counsels in relation to trying the case based upon either an insanity or a guilty but mentally ill defense, both of which are viable under Indiana law.

In fact, trial counsel Clutter did not articulate a case theory in his opening statement. [Trial R. 3656-3659]. Clutter acknowledged that their 'manslaughter' defense theory was a defense that did *not* go to Stevens "intent" at the time of the homicide. [PCR R. 2080] In other words, the failure to even secure a psychological evaluation and diagnosis led to a rejection of all available mental state defenses [PCR R. 2466-2467, 2513], in favor of a defense theory--voluntary manslaughter--that conceded formation of an intent to kill. [PCR R 2080]. See Ind.Code 35-42-1-3.

No defense witnesses were presented in the guilt phase. The trial court refused to instruct on voluntary manslaughter. [Trial R. 4345-4348] Baldwin nonetheless asked the jury to return a voluntary manslaughter verdict. [Trial R. 4380-4381, 4388]. The jury found Stevens guilty as charged.

Significantly, Petitioner fails to note that on direct appeal, the Indiana Supreme Court ruled that the trial court properly denied giving a voluntary manslaughter defense as it was unsupported by *any* facts at trial or under *any* theory of Indiana law. App. 251A-254A. That ruling is the law of this case, never having been challenged by either the Petitioner Warden or Respondent Stevens in any subsequent litigation.

In sentencing Stevens to death, the trial court adopted Lennon's language verbatim as well as his skewed view of Stevens finding that "[t]he defendant was shown to have free will and

free choice and was motivated to protect himself" [Trial R 5648].

Finally, although Petitioner argues that Stevens was not entitled to additional experts at public expense, Pet.19, *Ake v. Oklahoma*, 470 U.S. 68, 79-80 (1985), has long held a defendant is entitled to a competent expert.

C. Evidence was presented during State post-conviction proceedings that had counsels secured an expert who adhered to mainstream theories within the psychological and psychiatric communities the expert would have presented evidence establishing a severe dissociative disorder that would have supported a mental illness defense at mitigation.

During State post-conviction "mainstream" experts testified to their independent diagnoses that Stevens' suffered a severe dissociative mental illness and that the mental illness spoke directly to the issue of Steven's 'free will' at the time of the homicide.

Stevens was evaluated by Dr. Robert Kaplan, a board certified psychologist with expertise in trauma, substance abuse, and depression, [PCR R. 1979, 1989]; Dr. Phillip Coons, a board certified psychiatrist with expertise in dissociative disorders, [PCR R 1860, 1866], and Diane Burks, an expert licensed clinical social worker. [PCR R. 1485, 1494-1497] Each employed methodologies generally accepted within the psychiatric and psychological communities. [PCR R. 1499, 1872, 1993] Each doctor independently diagnosed Stevens as suffering from the *DSM-IV* Axis 1 major psychiatric disorders of dissociative disorder, major depression, substance abuse, and alcohol abuse; Axis 2 personality disorder of borderline personality disorder; and Axis 4 psychosocial stressors including physical and sexual abuse, neglect, and abandonment; and Axis 5 reduced global functioning. [PCR R. 1499, 1587, 1873-1875, 1995]

Drs. Coons and Kaplan opined that Stevens' mental diseases and defects manifested themselves during the homicide by dissociation and identification with Zachary Snider. [PCR R.

1887, 2001, 2004] Both opined that his mental illnesses, chronic substance abuse, and LSD use shortly before the homicide caused him to labor under an extreme mental or emotional disturbance at the time of the killing, impaired his ability to conform his conduct to the law and impaired his ability to appreciate the wrongfulness of his conduct. [PCR R. 1887-1888, 1891-1892, 2000-2004]

Dr. Kaplan, Dr. Coons, and Ms. Burks explained that Stevens' ability to make choices was impaired throughout his life. [PCR R 2027]. Had defense counsel consulted *any* readily available expert functioning within the mainstream of psychiatry and psychology, counsel would have learned that Stevens suffered from psychiatric disorders bearing a direct nexus to the commission of this offense [PCR R. 1885, 1887, 2001, 2004].

Dr. Kaplan testified that Stevens did not choose to have his dissociative disorder any more than someone would choose to have cancer. [PCR R.2028]. Dr. Coons testified that Stevens had "a very severe dissociative disorder." [PCR R. 1892, 2005]. Dr. Kaplan concluded that at the time of the killing Stevens' capacity to make personal choices "was nil" due to the influences of LSD, dissociative disorder, and borderline personality "all coming into play at the same time." [PCR R. 2029]. Dr. Kaplan testified that Stevens' mental disabilities "certainly caused the murder to occur." [PCR R.2022]. "Had he not dissociated . . . he could have prevented himself from committing the murder, and if he wasn't so impulsive by nature due to his borderline personality disorder, he would have been able to have more control over his actions, as well." [PCR R.2022]. Dr. Kaplan testified that "[t]he part of him that's able to appreciate the wrongfulness of his conduct was disengaged when he was dissociating." [PCR R. 2004]. Stevens had no way to utilize any judgment under those circumstances. [PCR R. 2003]. When asked "whether this killing was a deliberate and planned act," Dr. Kaplan testified that

> "It wasn't. It was done on the spur of the moment. It was impulsively done. It was done without any ability to realize the nature of what he was doing in terms of the wrongfulness of it, and it also occurred [] without the ability to restrain himself because all those things were disengaged by the fear and the survival instinct."

[PCR R.2023-2024].

These diagnoses were also concurred in by Diane Burks, a clinical therapist and expert in clinical social work and family therapy, who testified that denial and dissociation are the most frequent mechanism developed by abused children and that Stevens, as diagnosed, suffered many psychiatric illnesses associated with abused children in a severe form. [PCR. 1556, 1587-888]. The State presented no evidence refuting these expert opinions.

Each expert noted that the combination of dissociative disorder, borderline personality disorder, substance abuse, and depression, occur among persons subjected to childhood neglect, sexual and / or physical abuse. [PCR R. 1503-1504, 1588, 1989, 1996].[2] Stevens experienced childhood trauma, neglect, and abuse in his unstable, alcoholic, drug-infested, chaotic, sexually and physically violent family that resulted in a confused personal and sexual identity and the development of psychiatric disorders. [PCR R. 1504, 1556, 1561-62, 1886]. Stevens' school records also documented the mental isolation from one's surroundings characteristic of the dissociative. [PCR R. 1995-96]. Dr. Kaplan took issue with Dr. Lennon's approach that actions

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[2] Dr. Kaplan reviewed Dr. Lennon's records and found that even his test results clearly documented Stevens' dissociative disorder. [PCR R 1983]. However, as noted, Dr. Lennon did not recognize the mental health diagnosis as such. These results included MMPI results that revealed a pattern typical of dissociative, post-traumatic stress, and borderline personality disorders. [PCR R. 1880-1881, 2007-08]. Dr. Lennon's notes also reflected that Stevens deteriorated under stress and when confronted by intense emotions. Due to Dr. Lennon's rejection of mental illness, he was unable to recognize Stevens' deterioration as indicative of dissociation. [PCR R. 2007, 2013, 2015]. Dr. Lennon dismissed Stevens' inability to remember the killing as meaningless, [PCR R. 2013], and utterly failed to factor in the rape he suffered at age ten -- roughly the age at which Stevens' moral development was arrested. [PCR R. 2004, 2007].

reflect free will and choice, [PCR R. 2015], since one does not choose to have a dissociative disorder.

Dr. Kaplan testified that dissociative episodes are triggered by overwhelming emotional stressors that cause detachment of thought, emotion, and behavior. [PCR R. 1998, 2003] The dissociative's perception of reality changes as he loses the ability to reason, control his behavior, and remember what actions were taken. [PCR R. 1999-2000] The non-consensual sexual activity with Zachary and Zachary's threat to report were emotionally stressful events which produced two responses in Stevens: (1) an intense feeling of fright as he relived his own forcible rape and (2) an irrational belief that Zachary was the abuser and victimizer in their relationship. [PCR R. 2001, 2003, 2029, 2047] Stevens lost the ability to rationally analyze the situation and respond appropriately. [PCR R. 2003, 2023]

The inability to reason caused by dissociation was compounded by the recent use of LSD as well as Stevens' borderline personality disorder, which caused him to react impulsively. [R 2000]. In Dr. Kaplan's expert opinion, the stress of the molest and Zachary's threat caused Stevens to actively dissociate. Due to the dissociation, Stevens acted upon his emotions, did not understand what he was doing and could not conform his behavior to the law. [PCR R. 2000, 2003, 2022]. Evidence of Stevens' dissociation during the homicide is not negated by the efforts he made subsequently to cover up the offense.

Dr. Coons noted that Stevens' dissociative disorder was also evident in his clearly abnormal amnesia for large portions of his childhood, his childhood creation of a "getaway world," his depersonalization when sexually molested and molesting, and his development of typical co-morbid disorders of alcohol and substance abuse, depression, and borderline personality disorder. [PCR R. 1864, 1878-1879, 1883].

Finally, Petitioner Warden attempts to denigrate the unchallenged post-conviction evidence by making unsupported reference to Drs. Coons and Kaplan as "frequent expert witnesses for defendants." Pet.11. However, the evidence of record demonstrates that Dr. Lennon's test battery itself so clearly revealed the existence of a major psychiatric disease that the test results could have been used in a graduate psychology course. [PCR R. 2012, "You know, this is not, you know, speculative or theoretical. This is something that's been known for over 40 years."]

In short, had counsels secured an expert who adhered to mainstream theories within the psychological and psychiatric communities the expert would have presented evidence establishing a mental illness mitigation defense under Indiana law.

Reasons for Denying the Writ

The Seventh Circuit decision properly cited AEDPA standards and properly applied §2254(d) consistent with Supreme Court caselaw

1. The flaw in the Warden's entire petition is its bottom line argument that the deference due the State Supreme Court decision somehow precludes the granting of relief on this record. Yet, the Seventh Circuit began it own analysis by recognizing that the underlying facts of this case as "recounted in detail in the Indiana Supreme Court's decision affirming Stevens' conviction and sentence" are "entitled to a presumption of correctness." App. 4A Prior to its IAC analysis, the Circuit properly referenced the AEDPA's §2254(d)(1) and (2) deferential standards of review. App.11A. Yet, this is precisely what the Petitioner Warden repeatedly claims the Seventh Circuit *failed* to apply.

This Court has applied *Strickland* in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate and present mitigating evidence at the

sentencing phase of a death penalty trial constitutes ineffective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 390 (2000). In each of these cases, AEDPA deference is addressed by the Court's reviewing the extent of the factual evidence in the record and giving considered discussion to the extent that the state court specifically addressed and analyzed the same evidence in relation to the arguments raised. When the state court has given thorough consideration to the evidence and addressed the arguments raised, this Court has generally 'deferred' to the state court, distinguishing between a decision that is 'erroneous' from one that is an 'unreasonable application.' *Taylor*, 529 U.S. at 388.

However, when, like the Indiana Supreme Court, the state court does not address critical factual evidence or address key arguments, this Court has no trouble granting relief under AEDPA. *See e.g., Rompilla v. Beard*, 545 U.S. 374, 388-389 (2005)("Without specifically discussing the prior case file, the[] [state courts] too found that defense counsel's efforts were enough to free them from any obligation to enquire further . . .We think this conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion."). *See also, Visciotti*, discussed *infra*.

2. As to *Strickland*'s first prong, consistent with this Court's IAC jurisprudence, the Seventh Circuit Court began by giving review to the Indiana Supreme Court's post-conviction decision, which concluded that defense counsel *had* adequately investigated Stevens's mental health through Dr. Lennon," App.19A, and that Stevens' counsels "then made a strategic decision not to present mitigation evidence related to Stevens's mental health." App.20A. Earlier in its analysis of the culpability phase IAC claim, the Seventh Circuit correctly stated that their *Strickland* review of counsel's performance was "highly deferential" and Stevens would be

required to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." App.12A. The standard was repeated in the mitigation phase. App. 21A.

In spite of all the above facts omitted from the Statement of the Case, facts which were never addressed or substantively analyzed in the state court ruling, Petitioner Warden repeatedly asserts that the Seventh Circuit imposed their own "independent[]" judgment "without analysis under section 2254(d)." Pet.13. This is belied by the Seventh Circuit's analysis that specifically addresses the state court's cursory analysis, noting, for example, that the state post-conviction court "did not, however, have anything to say about Stevens's lawyers' decision to call Dr. Lennon as a defense witness for sentencing purposes, other than to acknowledge Stevens' argument that Dr. Lennon "was a fatal [sic] witness for the defense." App. 20A

Giving heed to *Wiggins*, *Taylor* and *Rompilla*, it is significant that like Petitioner Warden's redacted recitation of facts, the state post-conviction decision is void of mentioning *any* of the uncontradicted post-conviction evidence detailing that Dr. Lennon was so outside the mainstream that he did not even believe in the existence of mental illness or that he thought discussing the need to place Stevens on his lap and place a bottle in his mouth might actually mitigate in favor of a life sentence. *See i e.*,App. 141-143A. Failing to even address that extensive factual record, the Seventh Circuit did nothing in violation of AEDPA when it considered the evidence omitted by the state court and applied *Strickland*. By completely failing to even address counsel's choice of going forward with Dr. Lennon for mitigation, the state court, like Petitioner Warden, never acknowledges that defense counsel went forward firmly believing their client was mentally ill but without having secured any psychological diagnosis.

There is nothing in the record to discount the Seventh Circuit's finding that Stevens'

lawyers' decision to forego mental health mitigation "was made without the kind of investigation into Stevens's mental health that *Strickland* calls for, even after Stevens's lawyers had concluded that Dr. Lennon was a quack." App.23A. *Wiggins, supra.* And as the Circuit took note, "it is uncontested that Stevens's lawyers knew nothing about the content of Dr. Lennon's planned testimony. The lawyers confessed at the post-conviction hearing that they were utterly in the dark about what Dr. Lennon would say when he took the stand." App.23A These facts were also ignored by the state court decision. The Circuit's conclusion that counsels' acts and omissions were objectively unreasonable "on this record," App.24A, is consistent with habeas law which mandates consideration of the totality of the evidence presented. *See e.g., Williams v. Taylor*, 529 U.S. at 397-98.

3. Petitioner Warden's argument about the Seventh Circuit's "independent" review is also belied by the Circuit's prejudice analysis. The Seventh Circuit began by again referencing the state Supreme Court's post-conviction decision that "reasoned that Stevens was not disadvantaged by his counsels' failure to develop mitigation evidence regarding his psychological state[3] because such evidence "would have been strongly contradicted by the extensive evidence of the defendant's multiple attempts to kill Zachary and then carefully to take steps to cover up the crime." App. 24A-25A. Asserting a principle that even the Petitioner Warden cannot take issue with, the Seventh Circuit acknowledged that as a legal matter "a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not." App.25A.

The Seventh Circuit, consistent with *Wiggins*, *Taylor* and *Rompilla*, then properly

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[3] The Indiana Supreme Court referenced this as Stevens' "impaired ability to appreciate the wrongfulness of his conduct." *See* App.155A

considers *Strickland's* prejudice prong "[o]n this record," App. 26A, analyzing evidence not reviewed by the state court decision, that "if the jury had heard mainstream expert psychological testimony of the sort presented by Dr. Coons and Dr. Kaplan" the result would have been different." App.25A. It is worth noting that the Indiana Supreme Court's post-conviction decision made merely a passing footnote reference to Dr. Coons in its analysis of culpability phase IAC discussing the insanity defense, and made no mention of Dr. Kaplan's extensive testimony at all. There is also nothing in the decision about Dr. Lennon's personal hug therapy or his belief that because mental illness is a myth, all actions are a result fo free will and choice. Telling the jury that Stevens' killed the child as a result of his free will and deliberate choice could not possibly be expected to mitigate the offense.

Nor is there any mention of uncontested facts that the Seventh Circuit noted as being significant to a finding of prejudice. For example, the Circuit noted that Lennon "gave a gift [to the prosecution] by expressing his belief in Stevens's future dangerousness- a subject that the prosecution itself is not permitted to argue as an aggravating circumstance under Indiana law[,]" App. 26A, and noted that his evidence also had a "strong impact" upon the trial judge citing specific phrases from the trial court's decision. App.26A.

4. For all the Petition's focus upon the failure of the Circuit Court to apply AEDPA deference, the Petition details where the Indiana Supreme Court made any substantive factual determinations based upon any in depth review of the extensive post-conviction record. This Petition should be denied because the Warden does not acknowledge the clearly established guiding AEDPA principles this Court has established for assessing whether record support for the state court decision is indeed fair and hence a decision entitled to 'deference' under §2254(d)(1) and (2).

In that sense, it is ironic that Petitioner Warden argues pursuant to *Woodford w. Visciotti*, 537 U.S. 19 (2002) (*per curiam*), that the Seventh Circuit panel majority "substituted its own judgment for that of the state court." Pet.18. *Visciotti*'s "unreasonable application" analysis, (focusing on *Strickland*'s prejudice prong), turned primarily on the 'misperception' by the Ninth Circuit that the California state supreme court had

> failed to "take into account" the totality of the available mitigating evidence, and "to consider" the prejudicial impact of certain of counsel's actions."

Visciotti, 537 U.S. at 25. In fact, as this Court pointed out, "[a]ll of the mitigating evidence, and all of counsel's prejudicial actions, that the Ninth Circuit specifically referred to as having been left out of account or consideration *were* in fact described in the California Supreme Court's lengthy and careful opinion." *Id.* (Emphasis added).

Visciotti supports the Seventh Circuit's analysis because, as noted above, the Indiana Supreme Court completely 'failed to take into account' both the exhaustive evidence demonstrating Dr. Lennon "to be a quack" as well as the extensive mitigation evidence of Stevens' severe dissociative psychosis and mental illness, (occasioned in part from his brutal rape as a ten year old child); evidence that might have been gathered had counsels proceeded with any "mainstream" psychologist. *Visciotti* stands for the proposition that before a state court's *Strickland* analysis should be vacated, the reviewing court should undertake a record-intensive review to assess whether the state court's own analysis *did* 'take into account' the available mitigating evidence and whether the state court *did* consider the prejudicial impact of counsel's actions. In *Visciotti*, *id.*, at 26, referencing extensive state record cites, the Court recognized that the state record clearly demonstrated the California court *had* both reviewed and given analytical attention in "a lengthy, detailed discussion" to all the critical mitigation. As

such, the federal habeas court's own assessment that the very same evidence should have yielded a different result was impermissible under the AEDPA's "unreasonably application" clause. *Compare Luna v. Cambra*, 306 F.3d 954; *amended* 311 F.3d 928 (9th Cir. 2002) (where a "postcard denial" by the California state court provided the Ninth Circuit with no findings to which to defer, the Court must conduct an independent review of the record to determine whether the state court clearly erred in its application of federal law). In rejecting Stevens' mitigation claim, the Indiana Supreme Court gave precisely a 'postcard denial.'

Visciotti therefore supports the Seventh Circuit's majority's analysis.

III. Conclusion.

There is no reason for this Court to review the Seventh Circuit's run of the mill IAC at mitigation decision. There is nothing to support Petitioner's alarmist and inaccurately grandiose contention that the Seventh Circuit's "fractured decision" (Pet.3,13), rendered a ruling "without and analysis under section 2254(d)." (Pet.3,13). Petitioner Warden admits the Circuit Court properly "cited and applied the proper standard of 28 U.S.C. §2254(d),"(Pet.13), when discussing IAC at the culpability phase; but, then complains that in the mitigation phase discussion, the Circuit "reference[d] section 2254(d)(1) or its operative "unreasonable application" standard only once. (Pet.15). This Petition is simply about the Petitioner Warden not being happy with the Circuit Court providing sentencing phase relief for one the Petitioner is quick to label a "child molester." (Pet. 3)

In providing sentencing phase relief, the Seventh Circuit Court was clearly cognizant of the AEDPA standards of review, specifically identified the proper standards and stated that those standards were being applied. The Seventh Circuit engaged in proper review of this issue consistent with the Supreme Court case precedent and determined in a manner consistent with

clearly established Supreme Court precedent that Stevens was indeed prejudiced by trial counsels' ineffective assistance at mitigation. It is axiomatic that when a court cites the law, claims to apply the law and analyzes the facts under the law, it is presumed that the court actually is following the law. "There is no principle of law better settled, than that act of a court of competent jurisdiction shall be presumed to have been rightly" applied. *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam).

For the above stated reasons, Respondent Stevens requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Seventh Circuit's decision and opinion.

The Seventh Circuit's decision creates no conflict of law nor will it in any way create any sort of confusion in this Court's jurisprudence. Neither does it provide any other reason to warrant revisiting this well and clearly-established area of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

Kathy Lea Stinton-Glen, IN 17141-18
15 E. Oak Street
Zionsville, Indiana 46077
317. 319.0102
kldsg@msn.com

Alan Rossman OH 0019893
75 Public Square - Suite 1325
Cleveland, Ohio 44114
216.241.3658
alanrossman@ameritech.com

* Counsel of Record

COUNSEL FOR RESPONDENT

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IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as Superintendent of the Indiana State Prison,
Petitioner,

v.

CHRISTOPHER M. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

*Counsel of Record

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief and
Deputy Attorney General

Counsel for Petitioner

QUESTIONS PRESENTED

I. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel does not require trial counsel to retain successive mental-health experts in search of one that will give counsel's desired favorable opinion?

II. Does a state court unreasonably apply federal law under 28 U.S.C. § 2254(d) when it holds that the Sixth Amendment right to counsel permits attorneys in a death penalty case to exercise reasoned professional judgment to present expert testimony of a psychologist retained by the defense—the only one the state would pay for—that made both favorable and unfavorable findings in an attempt to make the best use of that expert that he can?

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ARGUMENT IN REPLY

The Seventh Circuit granted habeas relief vacating a death sentence after independently—and without analysis under the standards required by AEDPA—assessing trial counsel's decision to present the only mental health expert available to them at the penalty phase. The Seventh Circuit faulted counsel for (1) obeying the trial court's command and state law in disclosing the expert's report to the prosecution when the report was damaging to Stevens; and (2) not shopping for another expert who was willing to provide more favorable testimony (such as the experts Stevens later found to testify on state post-conviction review). In effect, the decision below merely disagreed with the state courts' judgments that trial counsel performed reasonably well under the circumstances and that Stevens failed to show prejudice from any mistakes of counsel.

Stevens argues that the Seventh Circuit properly found his trial counsel to have rendered ineffective assistance at the penalty phase because it made passing reference to the AEDPA standard. He also suggests that the Seventh Circuit need not have vigorously applied AEDPA because the Indiana Supreme Court's decision was not, in his estimation, sufficiently "in depth." Additionally, Stevens emphasizes a variety of factual assertions largely irrelevant to assessing whether, without the benefit of hindsight, trial counsel's decisions were within the wide range of professionally competent assistance. Stevens's arguments are not tenable.

I. Stevens's account of the facts are incomplete and largely unresponsive to the issues posed by this case.

Much of Stevens's additional factual assertions exaggerate the evidence, misstate the record, or are largely irrelevant to the precise issues before the Court. Stevens makes much of Dr. Lennon's opinions of, and approaches to, mental health issues, but downplays the careful efforts that trial counsel took in developing mitigating evidence—especially mental health evidence—on his behalf.

1. Stevens's brief mischaracterizes the circumstances that trial counsel faced when investigating Stevens's mitigation evidence. As such, his presentation of the facts vividly illustrates that his trial counsel can be judged ineffective only after examining the case through the "distorting lens of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Trial counsel began developing the case in 1993 when current theories and practices on how to best develop and present a death penalty mitigation case were in their infancy. Nevertheless, trial counsel hired a "mitigation specialist" whose sole job on the defense team was to investigate potential mitigating evidence and help trial counsel develop a persuasive mitigation presentation at the penalty phase of trial if necessary. As Stevens points out, Br. Opp. at 1-2, counsel and the mitigation specialist conducted an initial investigation into potential mitigating evidence so that they would be best informed on how to proceed with hiring experts and conducting a more detailed investigation. After this initial

inquiry, the defense team deliberately looked for a mental health expert with experience concerning the issues that they had uncovered.

Dr. Lennon was highly recommended by the mitigation specialist, as well as prominent members of the central Indiana capital defense bar, in large part due to Lennon's impressive performance in another death penalty case that posed issues that were similar to Stevens's case. Pet. App. 141a-142a, 182a. Dr. Lennon's credentials and experience were impressive and counsel had a concrete basis upon which to believe that he would be an equally impressive expert for Stevens's case. Pet. App. 142a-143a, 182a-183a. On counsel's motion, the trial court approved funds to hire Dr. Lennon. The trial court made clear to counsel that it would not approve funding for hiring additional mental health experts. PCR. R. 2508, 2561.

Contrary to Stevens's assertion that Dr. Lennon did not render a mental health diagnosis, the psychological evaluation (Trial R. 5358-61) made diagnoses of pedophilia and depression. Both of these diagnoses are mental disorders listed in the DSM-IV. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 339-45, 527-28 (Am. Psychiatric Ass'n, 4th Ed. 1994). Additionally, Dr. Lennon and his assessment team (consisting of a social worker and a second psychologist) conducted extensive research into Stevens's background and the facts of this case and gave Stevens 11 different tests before issuing a report. Trial R. 5358-61; Pet. App. 183a.

Moreover, Stevens does not discuss the expert testimony that Dr. Lennon ultimately provided

Stevens. He explained that Stevens suffered characteristics of reactive attachment disorder (although Stevens did not satisfy all of the diagnostic criteria for a diagnosis), and demonstrated antisocial and sociopathic tendencies (although there was an insufficient basis to make a diagnosis of antisocial personality disorder or sociopathic personality disorder). Trial R. 5324-26, 5350-54. He found Stevens to have the emotional age of a 12 to 13 year-old. Trial R. 5374. He also testified about Stevens's sexual abuse as a child and alcohol and drug use, but acknowledged Stevens's statement that he had stopped abusing substances when first arrested for the child molesting offense for which he was imprisoned before meeting Zachary. Dr. Lennon opined that "so much of [his] behavior could be explained by the abuse, the neglect that he's had on top of his genetic predisposition, and that ... his birth mother ... probably did do drugs or alcohol during pregnancy." Pet. App. 156a, 210a. This testimony formed the basis for the mitigating circumstances ultimately found by the trial court and relied upon by the Indiana Supreme Court. Pet. App. 276a-277a n.28.

2. Nor does Stevens discuss the unquestionably devastating evidence that Drs. Coons and Kaplan would have provided at the penalty phase had they testified instead of Dr. Lennon. Both Dr. Coons and Dr. Kaplan, experts frequently employed by capital defendants in Indiana, revealed additional, highly prejudicial facts that would have completely undermined Stevens's penalty-phase argument that Zachary was a willing participant in the molestation. The doctors testified on post-conviction review that Stevens forcibly molested Zachary against the boy's

will, a fact the jury did not hear. Pet. App. 45a-46a. To say the least, had the jury known the molestation was forcible, it is unlikely to have treated Stevens more leniently.

Furthermore, Dr. Coons admitted that dissociation (the condition that Drs. Coons and Kaplan diagnosed after Stevens's conviction) is a highly controversial diagnosis in the psychiatric field. Some prominent psychiatrists have written publications expressing skepticism as to the validity of dissociation as a mental condition. PCR R. 1895-96. Thus, Stevens essentially argues that his trial counsel erred by relying on a mainstream diagnosis from a controversial doctor rather than shopping for a controversial diagnosis from a more mainstream doctor. This is hardly a valid basis for finding ineffective assistance of counsel.

3. In an attempt to normalize the Seventh Circuit's opinion, Stevens invokes *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). His comparisons are untenable, as each of these cases involved trial counsel who wholly failed to conduct even the most basic investigation into critical and obvious areas of potential mitigation. Not even the Seventh Circuit has contended that such circumstances are present here.

Counsel in *Rompilla* inexplicably failed to even look at his client's file from a prior conviction for rape and assault—despite knowing that the prosecution planned on using those convictions to establish aggravating circumstances—that supplied a host of mitigation evidence that could not have

been found elsewhere. *Rompilla*, 545 U.S. at 385-86, 390-91. Counsel in *Wiggins* obtained some social services reports about their client but then conducted no additional investigation into the facts found therein, missing the opportunity to discover the severe physical, sexual, and emotional abuse their client suffered as a young child. *Wiggins*, 539 U.S. at 524-25. Counsel in *Williams* failed to prepare for sentencing until a week beforehand, to uncover extensive records graphically describing Williams's nightmarish childhood, to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade, and to examine Williams's prior conduct in prison. *Williams*, 529 U.S. at 395-96. In each of these cases, the attorneys had no reasonable excuse for not having done even basic factual research into their clients' lives.

Stevens's trial counsel, however, did have reasonable justifications for every choice they made. The Seventh Circuit faulted trial counsel for not hiring additional experts who would have been willing to reach different *opinions* (not relate historical *fact*). It expected counsel to have somehow hired these experts with no funding and after the discovery deadline for expert evidence had past.

There is no basis in clearly established federal law for that expectation. Stevens has never, in the nearly 15-year pendency of this case, presented evidence that the trial court would have approved—or even that he was entitled to—funding to hire additional mental health experts. The district court correctly held that *Ake v. Oklahoma*, 470 U.S. 68 (1985), did not require the state court to fund any

additional experts beyond Dr. Lennon, as "an indigent defendant [does] not have 'a constitutional right to choose a psychiatrist of his personal liking." Pet. App. 59a (*quoting Ake*, 470 U.S. at 83). In any event, the trial court went above the requirements of *Ake*, which merely requires that a defendant be given *access* to an expert, and gave Stevens funds to hire his own expert. *Ake*, 470 U.S. at 83. It cannot follow, as Stevens argues and the Seventh Circuit assumed, that the Indiana courts were therefore required to give Stevens even more funds to let him choose yet even more experts "of his personal liking."

Without the misleading benefit of hindsight, the Seventh Circuit had no basis to find the state courts' rejection of Stevens's ineffective assistance claim to be objectively unreasonable.

II. Stevens's argument reflects a fundamental misunderstanding of federal habeas review under AEDPA.

1. Section 2254(d) has as its purpose "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 702 (2002) (*citing Williams*, 529 U.S. at 403-04). To effectuate this purpose, AEDPA permits habeas relief for claims adjudicated on the merits by state courts only if those decisions were "contrary to or involved an unreasonable application of clearly established federal law." *Williams*, 529 U.S. at 412-13.

In its discussion of Stevens's penalty phase ineffective assistance claim, the Seventh Circuit majority did not analyze whether the Indiana Supreme Court's decision was objectively unreasonable. Instead it concluded that the Indiana Supreme Court was simply wrong and perforce "unreasonable." Pet. App. 26a. *See also* Pet. App. 24a ("We conclude, on this record, that the performance of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum."), 25a ("In this case, we find a reasonable probability—that is, one sufficient to undermine our confidence in the outcome of the sentencing phase—that the result would have been different if the jury had heard mainstream psychological testimony..."), and 26a ("We conclude that the conduct of Stevens's lawyers at his capital sentencing proceedings fell below the constitutional minimum standard and that this was prejudicial to Stevens.").

AEDPA prohibits such de novo review. *Early v. Packer*, 537 U.S. 3, 11 (2002) (per curiam); *Yarborough v. Alvarado*, 541 U.S. 652, 665-66 (2004). Stevens contends that the conclusory invocation of the "unreasonable application" clause, coupled with a recognition of the correct standard of review at the outset of the opinion, suffices. AEDPA is meaningless, however, if courts provide nothing more than "lipservice to the *Williams* standard." *Rompilla*, 545 U.S. at 404 (Kennedy, J., dissenting).

2. Even under Stevens's incorrect understanding of AEDPA, which would require a state court to have conducted an exhaustive and lengthy examination of all aspects of a prisoner's claims before being entitled to deferential review, the Indiana Supreme

Court's decision qualifies because it is fully reasoned and thoughtful.

Stevens fails to comprehend the standard of review and the Indiana Supreme Court's role in reviewing appeals from the denial of post-conviction relief. Unlike in some states where appellate courts have the power to review collateral judgments *de novo* or even sit as the trier of fact, the Indiana Supreme Court's review is more circumscribed. At the outset of its opinion, the state supreme court explained that, on appeal from the denial of post-conviction relief, the court looks only for whether the "evidence as a whole leads unerringly and unmistakably to a decision opposite that reached" by the trial court. Pet. App. 137a. "In other words, [Stevens] must convince [the Indiana Supreme Court] that there is *no* way within the law that the court below could have reached the decision it did." Pet. App. 138a (emphasis in original). Under this standard, it was unnecessary for the Indiana Supreme Court to engage in a deep discussion of Stevens's claims to properly adjudicate them. Regardless, the Section 2254(d) standard does not fluctuate depending on the length of the state court opinion.

3. When reviewing ineffective assistance claims, the Court has always been careful to examine the facts "as a defense lawyer would have done at the time". *Rompilla*, 545 U.S. at 385. The Seventh Circuit made no such effort. By the time Dr. Lennon issued his unfavorable and unsolicited report, trial counsel had no viable—let alone reasonable—option to secure alternative expert opinion testimony. This left counsel facing a Morton's Fork: either present

the testimony of Dr. Lennon in an attempt to explain Stevens's background and crime through an expert in child mental development despite Lennon's other harmful opinions, or do nothing and abandon any effort to explain to the jury and judge the psychological significance of Stevens's mitigating evidence, and thereby ensure a claim of ineffective counsel.[1] When faced with those alternatives, counsel's choice is a quintessential strategic decision, and neither can be deemed objectively unreasonable.

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[1] None of this is to say Dr. Lennon's testimony was a failure; he effectively explained the significance of Stevens's poor childhood and other mitigating evidence as it related to Zachary's murder. Pet. App. 156a, 210a, 276a-277a n.28; Trial R. 5280-377.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief and
Deputy Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

Counsel for Petitioner

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